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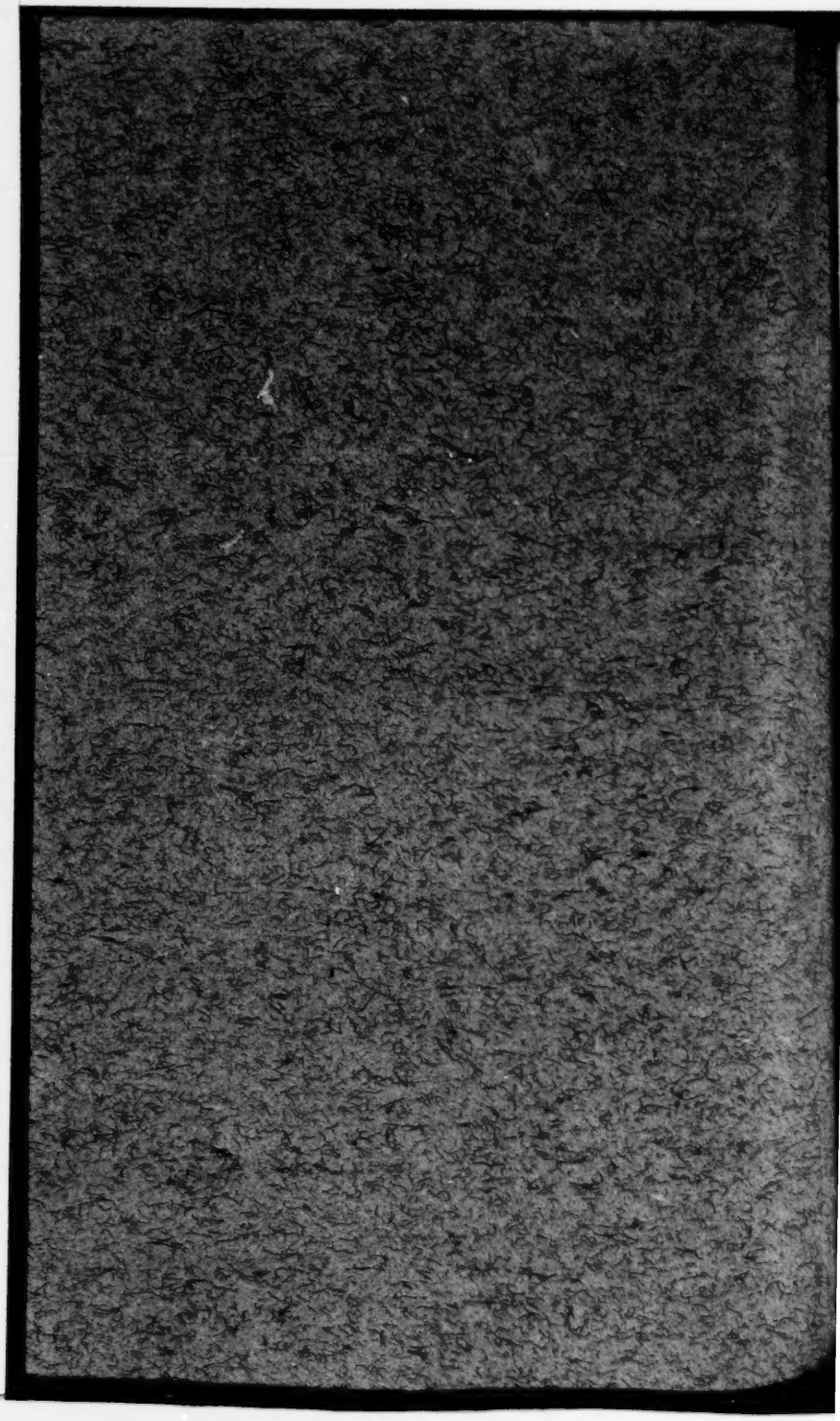

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 154

NEW AMSTERDAM CASUALTY COMPANY,
Petitioner,

vs.

MRS. CAMAY ARDOIN SOILEAU, TUTRIX, FOR THE USE AND BENEFIT OF HER MINOR SON, JOSEPH C. SOILEAU,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of New Amsterdam Casualty Company respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The manner in which this litigation arises is as follows:

This is a suit for damages for personal injuries sustained by respondent's minor son, Joseph C. Soileau, in an accident which occurred on February 20, 1946, while young

Soileau was in the employment of one Louis O. Campbell, who, we might point out at the inception of this statement, is not a party to this litigation.

The accident occurred when a piece of chain attached to one of Campbell's trucks, and which was being used to lift a heavy piece of well-drilling machinery preparatory to loading it on to the truck, broke in two and caused the piece of machinery to fall to the ground directly upon the left foot of young Soileau. This accident resulted in the amputation of Soileau's foot through the ankle, and in this suit his mother, respondent herein, suing as tutrix for his use and benefit, claims monetary damages in his behalf.

At the time of this accident, on February 20, 1946, young Soileau was approximately fifteen and one-half (15½) years of age, having been born on September 2, 1930 (R. p. 106). He had been working for Mr. Campbell only one (1) day prior to the afternoon when the accident occurred, but he had been similarly employed by Mr. Campbell for about a month in the fall of the preceding year (R. p. 107). On each occasion he had been employed as a truck helper to help load and unload trucks, Mr. Campbell being engaged in a "trucking" business (R. p. 190).

Act 301 of the General Assembly of Louisiana for the year 1908 as amended by Act 210 of the General Assembly of Louisiana for the year 1944, prohibits the employment of a minor under eighteen (18) years of age in certain specified activities, and admittedly, the work which young Soileau was employed to perform falls within the ban of that statute. However, he was a well-developed youth, and Mr. Campbell, his employer, had understood from a conversation with Soileau, himself, that the boy was, in fact, eighteen (18) years of age, even at the time of his first employment (R. pp. 192-195).

At the time of this accident, Louis O. Campbell was protected by two policies of liability insurance which had been

issued to him by petitioner and under which Campbell was insured against liability for damages arising out of bodily injuries—one being a Miscellaneous Liability Application Policy, No. LCMP 552 135, dated September 10, 1945, covering his liability resulting from the ownership, maintenance, or use of the premises where he operated his business; and the other being an Automobile Liability Insurance Policy, No. LA 78 924, dated June 10, 1945, covering his liability resulting from the ownership, maintenance, or use of certain motor vehicles belonging to him and described in a schedule attached to the policy. Both of these policies were in full force and effect on the date of the accident to young Soileau, and, admittedly, the truck involved in the accident was included in the schedule attached to the last mentioned policy, as a part of its insuring clause.

These policies of liability insurance will not be found in the printed record of this case, since by order of the District Judge (R. p. 274) all exhibits, including these policies, were sent up in the original, and they are now on file in the Circuit Court of Appeals, but the first mentioned policy is described and referred to in Articles XVII to XXII of respondent's original complaint (R. pp. 8-9), and the automobile policy is described and referred to in Articles I to III of an amended complaint (R. p. 15) which was filed by respondent on October 24, 1946.

As stated above, Louis O. Campbell, the alleged employer, was not made a party to this suit, respondent having elected to bring her complaint solely against petitioner under the provisions of Act 55 of the General Assembly of Louisiana for the year 1930. This statute reads as follows:

> "After the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sus-

tained or loss occasioned during the life of the policy, and any judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of the policy, by the injured person or his or her heirs against the insurer company. *Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits, of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company, alone or against both the assured and the insurer company, jointly and in solido.*" (Emphasis ours.)

"Provided that nothing contained in this act shall be construed to affect the provisions of the policy contract if the same are not in violation of the laws of this state.

"It being the intent of this act that any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured; provided the term and conditions of such policy contract are not in violation of the laws of this state. (Acts 1918, No. 253, Sec. 1; 1930, No. 55, Sec. 2.)"

and is generally known and referred to in Louisiana as the Direct Action Statute.

In her complaint (R. pp. 2-11) filed by respondent on September 14, 1946, in her capacity as tutrix of her said minor son, Joseph C. Soileau, and for his use and benefit, she alleged that she and her said minor son were "both residents of the Parish of Evangeline, Louisiana, which is within the Opelousas Division of the Western District of this Honorable Court"; that petitioner was "a corporation domiciled in another state"; and that Louis O. Campbell,

whose alleged negligence was made the basis of her action, was "a resident of the Parish of Evangeline, Louisiana."

The grounds of liability alleged to exist on the part of Louis O. Campbell, and which were asserted in respondent's direct action against petitioner, were two-fold:

First, respondent invoked the doctrine of *res ipsa loquitur* as the basis of her charge of negligence in the actual ocurrence of the accident; and,

Second, she charged that Mr. Campbell's employment of young Soileau, in contravention of the prohibition set out in the employment statute above referred to, constituted negligence per se which under the law must be regarded as the proximate cause of the accident, placing liability on Mr. Campbell, the employer, and consequently on petitioner, as his liability insurer.

Respondent's original complaint (R. pp. 2-11) was predicated upon the Miscellaneous Liability Application Policy first hereinabove referred to. She alleged total damages to her son aggregating One Hundred Twenty-nine Thousand, Six Hundred Forty-six and 50/100 ($129,646.50) Dollars, and, alleging that the limit of petitioner's liability for bodily injury to any one person in any one accident under the terms and provisions of said policy was Twenty-five Thousand ($25,000.00) Dollars, she asked for judgment against petitioner in that amount. By the amended complaint (R. pp. 14-16), referred to above, filed October 24, 1946, she alleged the existence and effectiveness of the Automobile Liability Policy referred to above, including an allegation that the limit of petitioner's liability for damages for bodily injury suffered by one person in an accident under the provisions of that policy was also Twenty-five Thousand ($25,000.00) Dollars; and by a second supplemental and amended complaint (R. pp. 31-33), filed on March 24, 1947, the first day of the trial in the District

Court, she alleged that she was entitled to recover for the benefit of her minor son the maximum limits of liability under both policies, and, accordingly, increased her demands against petitioner to a total of Fifty Thousand ($50,000.00) Dollars, being Twenty-five Thousand ($25,000.00) Dollars under each of the policies described in her pleadings.

As stated above, the policies in question will not be found in the printed record, but by a motion to dismiss and alternative motion for bill of particulars (R. pp. 12-14), petitioner appeared and set up the exclusions which are enumerated in the Miscellaneous Liability Application Policy, No. LCMP 552 135, as made the basis of respondent's original complaint, and by a second motion to dismiss and alternative motion for bill of particulars (R. p. 17-20), petitioner appeared and set up the exclusions to which the Automobile Liability Policy, No. LA 78 924, was subject. It is unnecessary for the purposes of this statement to repeat these exclusions in their entirety. We believe it sufficient to point out that the Miscellaneous Liability Application Policy, No. LCMP 552 135, contained, among others, the following exclusions (R. p. 13):

"This Policy Does Not Apply:

> "(a) to aircraft: or to elevators at premises owned, rented or controlled by the insured; or to dogs, draft or saddle animals, boats, vehicles of any kind (other than hand trucks, push carts and bicycles) or the loading or unloading thereof, while away from the premises; . . .
>
> " . . .
>
> "(f) to bodily injury to or death of any employee of the insured while engaged in the business of the insured, * * * "

and the Automobile Liability Policy, No. LA 78 924, contained, among others, the following exclusion (R. p. 20):

"This Policy Does Not Apply:

"(d) under coverages A and C, to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or while engaged in the operation, maintenance or repair of the automobile;"

By the motions to dismiss referred to above, petitioner sought to controvert respondent's right to invoke the direct right of action provided for by Act 55 of 1930 on the grounds that this is strictly a procedural statute and that the Federal Rules of Civil Procedure being the exclusive guide to or criterion of procedure in the Federal courts, this procedural statute could not be used as the foundation for a civil action in the Federal District Courts sitting in Louisiana. Its alternative motions for bills of particulars were designed to elicit, at the inception of the case and prior to the trial thereof, an acknowledgent by respondent of the exclusions enumerated in said policies and therby establish affirmatively a lack of coverage under both policies by reason of the fact that young Soileau, though perhaps illegally employed, was nonetheless an employee of Campbell within the intendment of the exclusions enumerated in these policies.

The trial Judge ruled adversely to petitioner on both points, his reasons for judgment (R. p. 21) being as follows:

"We believe that Act 55 of 1930, though strictly procedural, in essence becomes a real and substantive right to a resident of Louisiana when viewed in that citizen's behalf, so that he be enabled, because of the amount of $3,000 exclusive of interest being involved, to enter the

Federal Court—the diversity of citizenship generally existing because the insuring company is usually a non-resident of the State of Louisiana.

"So, because of the fundamental right of the Louisiana citizen to enter a Federal Court to vindicate his rights, when diversity of citizenship and an amount of over $3000 exists, we must overrule the motion to dismiss. *Sec. 41 (1), Tit. 28, U.S.C.A., Judicial Code, Sec. 24 (1).*

"We cannot adhere to movant's theoretical view that the benefit of Act 55 of 1930 to Louisiana's citizens has been taken away by the Act of Congress establishing the Federal Rules of Civil Procedure.

"Now, referring to the alternative that the bill of particulars requested should be granted, since the insurance policy is the one issued by movant itself, movant certainly has access to all of its provisions. Those provisions of the contract not included in plaintiff's petition can become items supporting movant's affirmative defense.

"Movant will absolutely be protected if it makes, as an affirmative defense, the additional provisions of the policy supposedly taking plaintiff's case out of Court. Then a motion for a directed verdict will be indicated."

Following this ruling by the District Judge, petitioner filed its answer (R. pp. 22-30) to the original and first amended complaints. In this answer petitioner set up three (3) defenses, as follows:

First: A general denial of negligence on the part of its insured.

Second: A lack of coverage under its policies.

Third: A plea that the employment by Campbell of respondent's minor son, even if prohibited by law, was not the proximate cause of the accident so as to render Campbell liable in damages for the injuries which young Soileau sustained.

When the second supplemental and amended complaint was filed on the day of the trial, petitioner's counsel dictated into the record of the proceedings the following stipulation (R. p. 39):

> "In the case we have on trial, may it please the Court, the Plaintiff has filed an amended complaint. It is not my desire to delay the trial in order to file an answer to that amended complaint, so, by agreement, it will be considered that all of the defenses contained in the previous answers are now to be considered as answer to the amended complaint; also, and in addition thereto, all the allegations of fact in the amended complaint are denied, except those which may be admitted in the answers which we have already filed."

On the following day, March 25, 1947, petitioner filed an amended answer in writing (R. pp. 34-36), in which, after answering the allegations of respondent's second supplemental and amended complaint, petitioner set up additional defenses based on the alleged contributory negligence of young Soileau, the injured party. The filing of this answer was permitted by the District Judge over objections by respondent's counsel, who was permitted to file a reply to petitioner's amended answer (R. pp. 36-38), wherein respondent denied the charges of contributory negligence made in petitioner's amended answer and reiterated the charges of negligence on the part of Louis O. Campbell which had been made in her previous pleadings.

The case was tried to a jury and resulted in a verdict in favor of respondent and against petitioner in the sum of Fifteen Thousand ($15,000.00) Dollars (R. p. 267). After petitioner's motion to set aside the verdict and for judgment in its favor, or, in the alternative, for a new trial, (R. pp. 267-269) had been overruled (R. p. 270), a judgment was signed (R. pp. 270-271) in favor of respondent for the use and benefit of her minor son, Joseph C. Soileau,

and against petitioner in the full sum of Fifteen Thousand ($15,000.00) Dollars, with legal interest from date of the verdict until paid.

Petitioner gave notice of appeal (R. pp. 271-273) and filed its supersedeas bond (R. pp. 274-279) in the amount fixed by the Court, following which respondent, through her counsel, filed notice of a cross-appeal (R. p. 279) from that part of the judgment which fixed the date from which interest should run as the date of the entry of the jury verdict instead of the date of judicial demand.

Petitioner's appeal and respondent's cross-appeal were duly heard by the Circuit Court of Appeals for the Fifth Circuit and in that Court an attack was made on the jurisdiction of the Court on grounds which will be set out in detail in the following division of this application, and in the supporting Brief:

In an opinion handed down on May 7, 1948 (R. pp. 288-295) the Circuit Court of Appeals for the Fifth Circuit maintained the jurisdiction of the Federal court and found for respondent on the question of interest raised by her cross-appeal. Accordingly, it amended the judgment appealed from so as to allow legal interest from judicial demand, or September 14, 1946, and as so amended affirmed the same, all at the cost of petitioner and the surety on its supersedeas bond. Judgment on appeal was entered on May 7, 1948 (R. p. 296). An application for rehearing (R. pp. 297-300) was duly filed, and on May 27, 1948, an order was entered (R. p. 301) denying a rehearing.

Petitioner claims error in the opinion and ruling of the Circuit Court of Appeals, as well as of the District Court, and seeks relief through the supervisory jurisdiction of this Court.

B

Reasons Relied On for the Allowance of the Writ

In invoking the supervisory jurisdiction of this Court and seeking a review by this Court of the opinion and judgment of the United States Circuit Court of Appeals for the Fifth Circuit, your petitioner shows:

1. *Lack of jurisdiction:*

That the District Court of the United States in which respondent's complaint was originally filed is wholly without jurisdiction of this litigation for the following reasons:

(a) That the sole allegations in respondent's pleadings as to the citizenship of either party to this litigation are found in Paragraph II of her original complaint (R. p. 2), wherein it is alleged that plaintiff and her said minor son are both residents of the Parish of Evangeline, Louisiana, within the Opelousas Division of the Western District of Louisiana, and that petitioner is a corporation domiciled in another state, which allegations, your petitioner shows, are not equivalent to allegations that the parties to this litigation are citizens of different states, and are wholly insufficient to establish the jurisdiction of the Federal court based on diversity of citizenship within the intendment of Section 24 of the Judicial Code (28 U. S. C. A. Sec. 41).

In justice to the District Judge, as well as to their Honors of the Court of Appeals, we should point out that this particular defect in the jurisdictional allegations has been overlooked up to the present time, and, as a consequence, it was not called to the attention either of the Trial Judge or the Court of Appeals. However, under the authority of *Jeffcott, et al.*, v. *Donovan*, (C.C.A. 9—1943), 135 Fed. (2d) 213, and the cases of this Court cited therein, it seems clear that jurisdiction over this litigation cannot be maintained based on the pleadings in this litigation.

(b) That since Act 55 of 1930, upon which respondent bases her right to proceed directly against petitioner, is strictly a procedural or remedial statute conferring no substantive rights (analogous to the Declaratory Judgment Act), the jurisdiction of the Federal courts based on diversity of citizenship must depend upon the citizenship of the parties to the actual controversy, as determined from the applicable substantive law. (See *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; and *Thompson, et al.*, v. *Moore* (C.C.A. 8—1940), 109 Fed. (2d) 372). The substantive law which must be applied to a solution of the controversy presented in this litigation is the law of torts which in Louisiana is embraced within Article 2315 of the Revised Civil Code; and under the law of torts, the actual controversy to the determination of which this litigation presents itself is formulated between respondent on the one hand and Louis O. Campbell on the other, who are both alleged to be residents of the Parish of Evangeline, Louisiana. Even if diversity of citizenship between petitioner and respondent be conceded, it is legally impossible for this respondent to allege a controversy solely with this petitioner because the procedural statute which gives her the right to bring this direct action against petitioner provides her with no substantive cause of action, and the substantive law of torts upon which her controversy must depend provides her with a cause of action against, or controversy with, only the assured, Louis O. Campbell, and not this petitioner. Accordingly, since petitioner can be brought into Court only by virtue of the provisions of a procedural statute and not under the provisions of any applicable substantive law, the mere fact that there may be diversity of citizenship as between respondent and petitioner is not sufficient to confer jurisdiction on the Federal courts under the Constitution of the United States and under the diversity provisions of the Judicial Code. (28 U.S.C.A. Sec. 41)

(c) That since Act 55 of 1930 is strictly a procedural or remedical statute and confers no substantive rights, and since the Rules of Civil Procedure for District Courts of the United States, as adopted and promulgated by this Court under the authority of the Act of June 19, 1934 (28 U.S.C.A. Sec. 723b, 723c), exclusively provide the procedure to be followed by the Federal District Courts sitting in any state, and since a direct action of the nature here sought to be enforced is not authorized by any of the rules which this Court has thus legally adopted for the regulation of procedure in the Federal District Courts, such Courts are wholly without authority to enforce the provisions of this procedural statute and, accordingly, the District Court of the United States for the Western District of Louisiana was without authority or jurisdiction to entertain this litigation (see *Sibbach* v. *Wilson and Company*, 312 U. S. 9, 61 S. Ct. 422, 85 L. Ed. 479).

(d) That in any event since Act 55 of 1930 is strictly a procedural or remedial statute and confers no substantive rights, it must, under rules of construction firmly entrenched in the jurisprudence of this, as well as lower Federal courts, and of the courts of last resort in the various states, be strictly construed and its provisions strictly complied with; and, accordingly, a complainant seeking to avail himself of the remedial provisions of that statute must bring his action strictly within the provisions of the statute and is restricted to one of the forums therein provided. (See *Hubbert* v. *Campbellsville Lumber Company*, 191 U. S. 70, 24 S. Ct. 28, 48 L. Ed. 101; and *Commissioners of Road District No. 2* v. *St. Louis Southwestern Railway Company*, 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364.) This statute requires that a suit brought thereunder must be brought "in the parish where the accident or injury occurred, or in the parish where the assured has his domicile", and since respondent has alleged herself to be a resident of Evangeline Parish, Louisiana, and has laid the locus of the accident as also being in Evangeline Parish, Louisiana, and since the District Court

of the United States for the Western District of Louisiana is domiciled in Shreveport, Caddo Parish, Louisiana, and since for the Opelousas Division of that Court it holds sessions only at Opelousas, in St. Landry Parish, Louisiana, it is clear that the District Court of the United States for the Western District of Louisiana does not satisfy the requirements of this statute, and this action could not under the law have been filed initially in such Court.

In urging this point we do not contend that the provisions of a remedial statute such as this is could be invoked to prevent the removal of this case to the Federal court where other jurisdictional requirements were present, but the point is now made that the venue provisions of this statute effectively prevent the initial institution of a suit thereunder in any forum other than one provided in the statute itself.

2. *Conflict with applicable local decisions:*

That the failure of the Circuit Court of Appeals, in the decision now sought to be reviewed, to sustain petitioner's attack upon Federal Court jurisdiction, on the grounds enumerated in sub-paragraphs (b) and (d) above, resulted from its having decided at least two important points of law in direct conflict with the established jurisprudence of the Courts of last resort of Louisiana. The errors thus committed are pointed out as follows:

(a) The Court erred in failing to hold that Act 55 of 1930 is strictly procedural in character and confers no substantive rights (which is the established jurisprudence of the Louisiana courts, as enunciated in *Rossville Commercial Alcohol Corporation* v. *Dennis Sheen Transfer Company, Inc.*, 138 So. 183; *Gager* v. *Teche Transfer Company, Inc.*, 143 So. 62; *Graham* v. *American Employers Insurance Company*, 171 So. 471; and *Burke* v. *Massachusetts Bonding & Insurance Company*, 24 So. (2d) 875, 209 La. 495); and in holding on the contrary that "the 1930 Act is not wholly proce-

dural, for it confers also a substantive right upon the injured party in the direct action granted such party against the insurer".

This holding is not only in direct conflict with the jurisprudence of the Louisiana courts, but is also in conflict with the previous jurisprudence of the Circuit Court of Appeals for the Fifth Circuit, as set out in the case of *Wells* v. *American Employers Insurance Company* (C. C. A. 5—1942) 132 Fed. (2d) 316, all of which jurisprudence has been wholly ignored in the decision of which petitioner now complains.

(b) The Court erred in holding that Act 55 of 1930 *subrogates* the injured person to all the rights of the insured within the terms and limits of the policy and, as a consequence of such subrogation, that suit might be brought in a Federal Court "if there is diversity of citizenship between him and the defendant, though the original debtor and the defendant are citizens of the same state".

If this observation were sound, the substantive law applicable to the alleged controversy between respondent and petitioner would be the law of *contracts*, since the only rights as between the assured and petitioner to which the injured party could possibly be subrogated are those arising out of the policy contracts issued by petitioner to Louis O. Campbell; whereas, the jurisprudence of the state courts of Louisiana is uniform to the effect that in a direct action of this nature the cause of action arises under the law of torts rather than the law of contracts. (See *Reeves* v. *Globe Indemnity Company*, 162 So. 724, 182 La. 905; *Burke* v. *Massachusetts Bonding and Insurance Company, supra*, 24 So. (2d) 875, 209 La. 495).

3. *Conflict with another Circuit Court of Appeals:*

That the Circuit Court of Appeals, in the decision now sought to be reviewed, by refusing to treat Act 55 of 1930 as a strictly procedural or remedial statute and by failing to look behind the allegations of respondent's complaint and

determine for itself the true nature of the controversy existing under the applicable substantive law, has reached a conclusion on the question of jurisdiction which is squarely in conflict with the decision of the United States Circuit Court of Appeals for the Eighth Circuit, as reached by it in the case of *Thompson, et al.*, v. *Moore* (C. C. A. 8—1940) 109 Fed. (2d) 372.

4. *Conflict with the Constitution of the United States:*

That in reaching the conclusion that the prohibition against employment of minors, as set out in Act 301 of 1908, as amended by Act 210 of 1944, *destroys* rather than *illegalizes* the relationship of employee and employer between a minor and the person by whom he is hired to perform the duties prohibited by that statute; and, as a consequence, that the exclusions contractually agreed upon between Louis O. Campbell and petitioner in the confection of the liability policies under examination in this suit are not effective against a claim for damages on behalf of a minor occupying the status prohibited by this statute, the Circuit Court of Appeals has given a construction to the language of this Act which is not only in conflict with the common acceptation of the meaning of the word "employ", but which, if allowed to stand, will have the effect of rendering this statute violative of Article I, Section 10 of the Constitution of the United States, as being a law impairing the obligation of petitioner's contracts of insurance.

For the existence of the relationship of employee and employer is a question of *fact* rather than *legality*, and the exclusions as set out in each of the liability policies here involved were designed to withdraw the coverage of those policies from any "employee" without regard to whether such employment was legal or illegal; and if the cited Act can legally be construed as meaning that a minor employed

in contravention of its terms is not an "employee" within the meaning of this exclusion, then the effect of such a construction is to introduce into these exclusions the qualifying adjective "legal" when reference is made to "employee", and thus wholly to rewrite, and effectively to impair the contracts as validly confected between petitioner and its assured; whereas under familiar rules of statutory construction, the language of a statute should be construed, if possible, so as to obviate any conflict with the Constitution.

5. *Other errors:*

That your petitioner reurges and reaffirms in this petition all of the assignments of error urged on its original appeal, as well as those set out in its application for rehearing (R. pp. 297-300), as filed in the Circuit Court of Appeals for the Fifth Circuit.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the said United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 12,147, "New Amsterdam Casualty Company, Appellant and Cross-Appellee, versus Mrs. Camay Ardoin Soileau, Tutrix, for the use and benefit of her minor son, Joseph C. Soileau, Appellee and Cross-Appellant," (and reverse title), and that said decree and judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorabe Court, and that your petitioner may have such other and further relief in the

premises as to this Honorable Court may seem meet and just; and your petitioner ever prays.

NEW AMSTERDAM CASUALTY COMPANY,
BY ATLEE P. STECKLER,
BY JOSEPH A. LORET,
BY THOS. W. LEIGH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 154

NEW AMSTERDAM CASUALTY COMPANY

Petitioner,

vs.

MRS. CAMAY ARDOIN SOILEAU, TUTRIX, FOR THE USE AND BENEFIT OF HER MINOR SON, JOSEPH C. SOILEAU,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I

The Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in *167 Fed. (2d) 767;* Advance sheets of June 21, 1948.

II

Jurisdiction

1. The statutory provision believed and relied upon to sustain the power of this Court to grant this petition is:

Judicial Code, Section 240, as amended by the Act of February 3, 1925, 28 U. S. C. A. Sec. 347, 43 Stat. 938.

2. The date of the judgment to be reviewed is May 7, 1948, (R. p. 296); a petition for rehearing (R. pp. 297-300) was duly filed on May 20, 1948; and such petition was denied on May 27, 1948, (R. p. 301).

3. This is an action in tort filed by respondent against petitioner as the liability insurer of Louis O. Campbell, the alleged tort-feasor, under the provisions of Act 55 of the General Assembly of Louisiana for the year 1930, generally known in Louisiana as the Direct Action Statute. The record shows that the amount in controversy is in excess of the minimum jurisdictional requirement, but petitioner contests the existence of other prerequisites to Federal court jurisdiction; the right of appeal to the United States Circuit Court of Appeals is provided for by *Section 128* of the *Judicial Code* (*28 U. S. C. A., Sec. 225*); and except for the exercise of the supervisory jurisdiction of this Court, the decree of the Circuit Court of Appeals is final; and the jurisdiction of this Court to review the opinion and decree of the Court of Appeals now being complained of is specially granted by *Judicial Code, Section 240,* as amended by the *Act of February 3, 1925; 28 U. S. C. A., Sec 347; 43 Stats. 938.*

4. Jurisdiction to issue the writ now being sought has been sustained in many cases. We cite only one, namely, *Aetna Life Insurance Company* v. *Haworth,* 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000.

III

Statement of the Case

1. A statement of the case has been given under heading "A" in the petition, and in the interest of brevity, such statement is not repeated here but the Court is respectfully referred to that statement.

IV

Specification of Errors

It is believed that the reasons relied upon for the allowance of this writ, as set out in Division "B" of our application, together with the summary which follows of the various points to be discussed in our Argument, clearly indicate the errors of which we complain, and will suffice to dispense with the setting out of a formal Specification of Errors.

V

Summary of Argument

PRELIMINARY STATEMENT

Wherein are set forth, in narrative form, the *primary* grounds of error upon which this application is based, and the special and important reasons relied upon for its allowance.

Point I

In any case the allowance of a writ of certiorari is a matter which addresses itself to the sound discretion of this Court, but an erroneous assumption of jurisdiction on the part of an inferior court over a case to which its jurisdiction does not extend constitutes a valid basis for such an exercise of this Court's supervisory power in order that the jurisdictional issue may be correctly resolved.

Point II

The Federal courts sitting in any State are bound: (1) to accept the interpretation placed on a State statute by the highest Court of such state; and (2) to apply the jurisprudence of such State (irrespective of statutory construction) as determined by the decisions of its courts of last resort.

Point III

A. The holding by the Circuit Court of Appeals that Act 55 of 1930 is not wholly procedural but confers also a substantive right upon the injured party is in direct conflict with the interpretation given it by the Louisiana courts, which have construed this statute as being wholly procedural or remedial in character and conferring no substantive rights.

B. The holding by the Circuit Court of Appeals that the rights enjoyed by respondent under Act 55 of 1930 result from her being legally subrogated to the rights of petitioner's assured under the contracts of insurance is in direct conflict with the applicable local decisions which hold that such rights are governed by the law of torts.

Point IV

Since Act 55 of 1930 is strictly procedural or remedial in character and confers no substantive rights, the jurisdiction of a Federal court, when selected by an injured party as the forum for the enforcement of the remedy granted him by the statute, must be determined from a consideration of such injured party's actual controversy, as it arises under the applicable substantive law.

Point V

Under the substantive law of torts in Louisiana the only controversy enjoyed by respondent is one with petitioner's

assured, and the jurisdiction of the Court below must, therefore, depend upon a diversity of citizenship between respondent and petitioner's assured rather than upon a diversity of citizenship between respondent and petitioner.

Point VI

Respondent here could not invoke an exercise of the remedy granted her by Act 55 of 1930 without at the same time accepting the conditions attached by the statute itself as to the place in which the suit should be brought, and, accordingly, her suit under this statute could not be instituted initially in the Federal court.

Point VII

Irrespective of our primary grounds of objection to the jurisdiction, and even if both should be rejected, there is in this case an absence of jurisdictional averments as to diversity of citizenship, even as between respondent and petitioner.

Point VIII

Irrespective of the question of jurisdiction, the procedural statute now under discussion is not applicable to civil actions in the Federal courts.

Point IX

In this case the Circuit Court of Appeals for the Fifth Circuit has rendered a decision which is squarely in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same subject matter.

Point X

Act 301 of 1908 (La.) as amended by Act 210 of 1944 (La.) has been construed in such a way as to impair the obligations of petitioner's contracts of insurance as issued to its assured.

VI

ARGUMENT

Preliminary Statement

Our primary purpose in presenting this application is to seek a review by this Court of two important questions of Federal jurisdiction, one of which has been incorrectly resolved, and the other of which has been wholly ignored, by the Circuit Court of Appeals. Other errors have been committed and other questions arise which we shall discuss in the course of our argument herein, but the most serious question in the case, and the one which is of such tremendous general interest not only to every insurance company doing business in the State of Louisiana, but to every citizen of the State, as the potential injured party in a tort action, is that of jurisdiction.

The Louisiana statute, *Act 55 of 1930*, upon which respondent's complaint was based has been reproduced in full on page 4 of our application, but for convenient reference we quote again at this point the clause of that statute which provides the direct action which respondent is here seeking to enforce. This clause reads as follows:

> "Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido."

The two questions of jurisdiction which immediately present themselves and which were urged without success in

the Circuit Court of Appeals may be stated affirmatively as follows:

> I. Since a procedural statute is not jurisdictional, the jurisdiction of a Federal court, when selected as the forum for the enforcement of a procedural statute, must depend upon its jurisdiction of the controversy presented under the applicable substantive law—here the law of torts—and therefore jurisdiction of the Federal courts in this particular case fails unless diversity of citizenship is shown between the respondent and petitioner's assured, as the alleged tort-feasor.
>
> II. Respondent cannot avail herself of the procedural right accorded by this statute, to bring a direct action against petitioner, without accepting the condition attached by the statute as to the forum in which the suit shall be brought—here the parish where the accident occurred or the parish where the assured has his domicile—and as a consequence cannot initially institute her suit in a Federal court.

Both of these propositions, we submit, are perfectly sound, and either is sufficient to defeat the jurisdiction which respondent is here seeking to invoke.

Condensed into syllogistic form, these grounds of objection may be developed as follows:

I. *Absence of jurisdiction over the "controversy" here presented:*

> 1. The clause of this statute, Act 55 of 1930, as quoted above, is strictly remedial or procedural in character and confers no substantive rights. (See Point III—A infra)
>
> *Rossville Commercial Alcohol Corp.* v. *Dennis-Sheen Transfer Co., Inc., et al.*, 138 So. 183.
>
> *Gager* v. *Teche Transfer Company, Inc.*, 143 So. 62.
>
> *Rambin* v. *Southern Sales Company, Inc., et al.*, 145 So. 46.

Robbins v. *Short*, 165 So. 512.
Graham v. *American Employers Insurance Co.*, 171 So. 471.
Burke v. *Massachusetts Bonding & Insurance Company*, 209 La. 495, 24 So. (2d) 875.

2. Being strictly a remedial or procedural statute, (analogous to a Declaratory Judgment Act), Act 55 of 1930 provides, within and of itself, no substantive basis for any "case" or "controversy" to which, under Article III, Section 2 of the United States Constitution, the judicial power of the Federal courts may extend. (See Point IV infra)

Liberty Warehouse Company v. *Grannis* 273 U. S. 70, 47 S. Ct. 282, 71 L. Ed. 541.
Nashville C. & St. L. R. R. Co. v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730.
Aetna Life Insurance Company v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000.
Southern Pacific Company v. *McAdoo* (CCA9—1936), 82 Fed. (2d) 121.
Thompson et al. v. *Moore* (CCA 8—1940), 109 Fed. (2d) 372.
Burke v. *Massachusetts Bonding & Insurance Company*, 24 So. (2d) 875, 209 La. 495.

3. Accordingly, the justiciable character of the "case" or "controversy," for the assertion of which the statute affords a remedy, must be determined by reference to the applicable substantive law. (See Point IV infra)

See cases cited under Statement 2 above.

4. Since under Article III, Section 2 of the United States Constitution, the judicial power of the United States courts (so far as diversity cases are concerned) extends only to "controversies . . . between citizens of different states," the diversity of citizenship requisite to the assumption of jurisdiction by the Federal courts when called upon to enforce a remedial statute must exist between the parties to the actual "contro-

versy," as determined by the applicable substantive law. (See Point IV infra)

See cases cited under Statement 2 above.

5. The "case" or "controversy," for the enforcement of which an injured party is given a right of direct action against the insurer company under this procedural statute, arises under the substantive law of torts, and though enforceable against the insurer company under the provisions of this remedial statute, such injured party's substantive rights as thus made enforceable are derived from and dependent upon the substantive law of torts. (See Point III-B infra)

Reeves v. *Globe Indemnity Company,* 182 La. 905, 162 So. 724.

Reeves v. *Globe Indemnity Company,* 185 La. 42, 168 So. 488.

Burke v. *Massachusetts Bonding & Insurance Company,* 24 So. (2d) 875, 209 La. 495.

6. Hence, the jurisdiction (based on diversity of citizenship) of the Federal courts when called upon to enforce this procedural statute, must be dependent, not upon a diversity of citizenship between the injured party and the insurer company, but upon a diversity of citizenship between the injured party and the assured, who is the other party to the only "controversy" enjoyed by the injured party under the substantive law of torts. (See Point IV infra)

See cases cited under Statement 2 above.

7. The law of torts in Louisiana is embodied in *Article 2315 of the Revised Civil Code,* which provides that:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it";

and under this substantive law, the only "case" or "controversy" enjoyed by an injured party is a case against or controversy with the assured in his capacity as an alleged tort feasor. This Article provides no

case or controversy between the injured party and the insurer company. (See Point V infra)

8. Hence, when respondent sought to avail herself of the procedural rights granted her by this statute, and to enforce, in a Federal court, the remedial provisions of Act 55, of 1930, she was required to allege and prove, as a prerequisite to the assumption of jurisdiction by such Court, a diversity of citizenship between herself and Louis O. Campbell, petitioner's assured. (See Point V infra)

9. And since in this case it appears that no such diversity of citizenship exists, the lower Court was wholly without jurisdiction of the only "controversy" here presented, and this suit must be dismissed for lack of jurisdiction. (See Point V infra)

II. *Incapacity of respondent to select the Federal court as the initial forum for the assertion of the remedy created by this statute:*

1. Here again, the initial premise is assumed that the quoted clause of Act 55 of 1930 is wholly remedial or procedural in character and confers no substantive rights. (See Point III-A infra)

Rossville Commercial Alcohol Corp. v. *Dennis-Sheen Transfer Co., Inc., et al.* 138 So. 183.

Gager v. *Teche Transfer Company, Inc.*, 143 So. 62.

Rambin v. *Southern Sales Company, Inc., et al.*, 145 So. 46.

Robbins v. *Short*, 165 So. 512.

Graham v. *American Employers Insurance Co.*, 171 So. 471.

Burke v. *Massachusetts Bonding & Insurance Company*, 24 So. (2d) 875, 209 La. 495.

2. Statutes which provide new and extraordinary remedies must be strictly construed, and the steps pointed out for the enjoyment of the remedy should be considered as mandatory, rather than as directory or optional. (See Point VI, infra)

59 C. J. 1130, verbo Statutes, Sec. 669.
Campbellsville Lumber Company v. *Hubbert* (CCA 6—1902), 112 Fed. 718.
Hubbert v. *Campbellsville Lumber Company,* 191 U. S. 70, 24 S. Ct. 28, 48 L. Ed. 101.

3. In order to avail himself of the privileges accorded him by a new and extraordinary remedial statute, a litigant must accept the condition attached by the statute, itself, as to the place in which his suit shall be brought. (See Point VI, infra)
Guilfoil v. *Hayes* (CCA 4—1936), 86 Fed. (2d) 544.
Miller v. *Commercial Standard Insurance Company,* 6 So. (2d) 646, 199 La. 515.

4. Accordingly, this respondent, in order to avail herself of the remedy provided her by Act 55 of 1930, was required to institute her suit initially "in the parish where the accident or injury occurred, or in the parish where the assured has his domicile." (See Point VI, infra)
See cases cited under Statement 3 above.

5. The United States District Court for the Western District of Louisiana, being domiciled at Shreveport, Caddo Parish, Louisiana, and holding sessions for the Opelousas Division only in St. Landry Parish, Louisiana, is not a court of Evangeline Parish, Louisiana where this accident is alleged to have occurred, and where the assured is alleged to reside. (See Point VI, infra)

6. From which it follows that, although a defendant, properly sued under the provisions of this statute in one of the forums provided by the statute, might in a proper case remove the case to this Federal court, such a suit cannot under the plain provisions of this Act be instituted initially therein, and such court is not a proper initial forum for the enforcement of the remedy granted by this statute. (See Point VI, infra)

Although both of these grounds of attack upon the jurisdiction of the Court below were seriously urged in the Cir-

cuit Court of Appeals, that Court omitted altogether to rule on the second ground of attack set out above. Its opinion (R. pp. 288-295) will be searched in vain for a single syllable which discusses or answers our second contention, as set out above. As a consequence, we shall be unable to comment, in this brief, upon the reasons which prompted its rejection of our argument on this point.

And its sole answer to our first ground of jurisdictional attack is comprised within a single paragraph of the opinion, found at pages 291-292 of the record, and which reads as follows:

> "The 1930 Act is not wholly procedural, for it confers also a substantive right upon the injured party in the direct action granted such party against the insurer. Nor is the act procedural in the sense that the Federal Rules of Civil Procedure are procedural; it deals neither with practice nor procedure in civil actions. If under it suit is instituted in a State court, State practice and procedure govern; if instituted in a federal court, federal practice and procedure become applicable. Equally without merit is the contention that the court below was without jurisdiction, since the actual controversy was one between the insured and the injured party, both citizens of Louisiana. The Act of 1918, as amended by the Act of 1930, makes the indemnity in favor of the insured *inure to the benefit of the person who thereafter is injured by the negligence* of the insured. *Lawrason* v. *Owners' Automobile Ins. Co. of New Orleans, supra;* and *Merchants Mutual Automobile Liability Ins. Co.* v. *Smart, supra.* In other words, *it subrogates* the injured person to all the rights of the insured within the terms and limits of the policy. Where the asserted right of action arises by subrogation and not by assignment, the subrogated party may sue on such right in a federal court if there is diversity of citizenship between him and the defendant, though the original debtor and the defendant are citizens of the same State. *City of New Orleans* v. *Whit-*

ney, 138 U. S. 595, 34 L. Ed. 1102; 2 Hughes, Federal Practice, Sec. 894, p. 148." (Emphasis by the Court).

In this paragraph the Circuit Court of Appeals has decided, not one but two, important questions of local law "in a way probably in conflict with applicable local decisions". As a matter of fact, in our view, the conflict is obvious rather than probable, as we shall undertake to demonstrate in a later Division of this brief. But for the moment we shall content ourselves with the mere statement of this conclusion without supporting argument, as it is our purpose in these preliminary remarks merely to call attention to the principal grounds upon which our application for this writ is predicated.

The first error arises out of the Court's assertion that the 1930 Act is not wholly procedural, but confers also a a substantive right upon the injured party—a statement which is unsupported by the citation of any authority, unless it be that the quotation from the case of *Miller* v. *Commercial Standard Insurance Company*, 6 So. (2d) 646, 199 La. 515, appearing on the preceding page of the Court's opinion, was intended as the basis for this ruling. If so, an examination of the *Miller* case will disclose that the question as to the remedial or substantive nature of the right created by this statute was not there at issue, and this isolated quotation, selected by the Court without assistance of counsel, cannot possibly constitute that case as authority for the conclusion it thereafter expressed. The Court's holding in respect to the character of this statute *is in direct conflict with the jurisprudence, as cited above, of the Loiusiana courts*, which have repeatedly and uniformly construed this statute as being strictly remedial or procedural in character and conferring no substantive rights —a holding which was reaffirmed by the Supreme Court of Louisiana as recently as 1946, in the case of *Burke* v. *Massa-*

chusetts Bonding & Insurance Company, 24 So. (2d) 875, 209 La. 495, decided four years after the decision in the *Miller* case.

The second error lies in holding that Act 55 of 1930 makes the indemnity in favor of the insured *inure to the benefit of the person who thereafter is injured by the negligence* of the insured, and that the statute *subrogates* the injured person to all the rights of the insured within the terms and limits of the policy. Here again the Circuit Court of Appeals has wholly ignored the jurisprudence of the Louisiana courts dealing with the Act now under discussion. Neither of the cases cited by the Court to sustain its theory of subrogation, namely, *Lawrason* v. *Owners' Automobile Insurance Company of New Orleans,* 136 So. 57, 172 La. 1075, and *Merchants Mutual Automobile Liability Insurance Co.* v. *Smart,* 267 U. S. 126, 45 S. Ct. 320, 69 L. Ed. 538, has any application to the case at bar. The *Lawrason* case involved an interpretation of the earlier Louisiana statute, Act 253 of 1918, which did not purport to give the remedial right of direct action accorded for the first time by Act 55 of 1930, but simply required that liability policies contain a provision that the insolvency or bankruptcy of the assured should not release the company from the payment of damages incurred under the policy; and the *Smart* case involved an interpretation by this Court of a similar statute in the State of New York. Under both of these statutes, the obtaining of a judgment against the assured and the nonpayment of such judgment by the assured was a condition precedent to the maintaining of an action against the insured, and (without our being under any necessity for admitting the proposition) it might well be conceded that the liability policy under such circumstances inures by legal subrogation to the benefit of the injured party, and that he is thereby subrogated to the rights of the insured

within the terms and limits of the policy. But such a view cannot be sustained in regard to the *additional remedy of a direct action* provided by the amending statute, Act 55 of 1930, under the construction which has been given to the amending statute by the Louisiana courts. For, if the injured party's right of direct action under the amending statute be held to result from the principle of subrogation, his substantive rights would have to be governed by the law of contracts, (as was the case in the *Lawrason* and *Smart* cases, *supra*) since the only relationship between the assured and his insurer is the contractual relationship resulting from the issuance of the policy of liability insurance; whereas, the Louisiana courts have uniformly and without exception held that the rights to be asserted by an injured party availing himself of the remedy of direct action accorded by this statute must be determined by the law of torts. Certainly, the insured enjoys no action *in tort* against his insurer, to which the injured party can succeed under the principle of subrogation thus invoked by the Circuit Court of Appeals.

In the last sentence, as quoted above, from the opinion which we are now seeking to have reviewed, the Circuit Court of Appeals simply points out that a subrogee may maintain a suit in the Federal Court against the ultimate debtor if there exists the necessary diversity of citizenship between them even "though the original debtor and the defendant are citizens of the same State". With this statement of the law as an academic proposition we have no quarrel, but it gives rise to an almost inescapable conclusion that the Court entirely misconceived our argument that the jurisdiction of the Federal Court *must depend upon a diversity of citizenship between the parties to the actual controversy as it exists under the applicable substantive law.*

We have never argued, and do not now contend that the jurisdiction of the Federal Court in this case is in any manner dependent upon a diversity of citizenship, or that it can be defeated by a community of citizenship between *petitioner* and its *assured*. We are merely contending that the Federal Court's jurisdiction in this case was defeated by the community of citizenship which existed between *respondent* and *petitioner's assured*, and for the purposes of our argument, any absence of diversity of citizenship as between petitioner and its assured is wholly immaterial.

So far as the writer of this Brief has been able to discover, Wisconsin is the only State other than Louisiana which has thus provided by statute a procedure for the enforcement by an injured party of a direct action against an insurer company of his claim for damages arising out of the alleged tort of the assured, whose liability therefor the insurer company has engaged to protect within the terms and limits of its insurance contract. A number of States have provided by statute for a direct action against the insurer company in the event of the insolvency of the assured, but those statutes all contemplate the initial ascertainment of the assured's liability contradictorily with him, and some showing of the uncollectibility of such judgment from the assured as a condition precedent to the direct action against the insurer. And in such a case the suit is one on the contract of insurance rather than one sounding in tort (*Merchants Mutual Automobile Liability Insurance Company* v. *Smart*, 267 U. S. 126, 45 S. Ct. 320, 69 L. Ed. 538). Whereas, under the quoted provision of the Louisiana statute the injured party may proceed to adjudicate the alleged tort liability of the assured in a direct action directly against the insurer company either jointly and *in solido* with the assured or, as in the present case, alone and without joinder of the assured as a co-defendant. It

is clear therefrom that previous jurisprudence dealing with the class of statutes just above referred to, and such as was under consideration by this Court in the *Smart* case, *supra*, has no application to the Louisiana statute.

As stated above, Wisconsin is the only State, within our knowledge, which has adopted a Direct Action Statute of this character, but the pattern set by this statute is of such far-reaching significance, both socially and juridically, as to raise questions of general, if not in fact universal, interest and importance, and, as we think, to justify a review by this Court, certainly of the jurisdictional issues, if not of all the questions presented by this application.

Moreover, the importance of the jurisdictional questions here raised, and the necessity for a review thereof by this Court, are accentuated by the fact that the Federal courts in Louisiana have heretofore *assumed* that they had jurisdiction in a suit of this kind without the questions which we are here urging having heretofore been raised or passed upon. For instance, see the case of *Bankers Indemnity Ins. Co.* v. *Leake* (CCA 5—1936), 84 Fed. (2d) 191, where the only reference to the Act now under discussion was as follows:

> "As permitted by Louisiana statute (Act No. 55 of 1930), the suit was brought against the insurance company alone, and resulted in a verdict and judgment for the appellee."

or, *Standard Acc. Ins. Co.* v. *Rivet* (CCA 5—1937) 89 Fed. (2d) 74, wherein it was remarked in passing:

> "The action, under the authority of Act No. 55 of the General Assembly of Louisiana of 1930 was brought directly against appellant, the insurance carrier."

or the quite recent case of *Banks* v. *Associated Indemnity Corp.* (CCA 5—1947) 161 Fed (2d) 305, where again the

existence of jurisdiction was assumed, as appears from the following language:

> "Margaret Janice Banks, wife of the decedent, individually and in behalf of her minor child, brought this suit for damages against the Associated Indemnity Corporation and against The Travelers Insurance Company under Act 55 of the Legislature of Louisiana for the year 1930, which permits an injured person to sue directly an insurer without joining the insured."

The United States District Courts have likewise assumed such jurisdiction in numerous cases extending through *Richburg* v. *Massachusetts Bonding & Insurance Company* (W. D. La.—1947), 74 F. Supp. 442. But in no case until the present one, and the nearly contemporaneous case of *Dean* v. *Bituminous Casualty Corporation* (W. D. La.—1947), 72 F. Supp. 801, which will hereinafter be discussed in more detail, have the jurisdictional questions which we are now urging been even suggested.

This assumption of jurisdiction of so many years' standing renders it all the more important for the jurisdictional issues to be settled by this Court; for, although an assumption of jurisdiction, regardless of howsoever long a standing, cannot operate as authority for the taking of jurisdiction by a Federal court where its jurisdiction does not affirmatively appear, still the frailties of human nature are such that the more often an erroneous conclusion is assumed and asserted, the less the inclination to review the fundamental misconceptions upon which the error is predicated, and the greater the inclination to accept as true a doctrine which in point of law cannot be sustained. Hence the necessity for intervention on the part of higher authority for the purpose of steering the judicial craft back upon its proper course.

It is our view, and we so submit, that a mere reading of our grounds of attack upon the jurisdiction of the Court below, coupled with the most cursory examination of the authorities cited in support of the various propositions outlined above, is sufficient to demonstrate that a very serious jurisdictional issue has been raised in this case which has probably been erroneously resolved by the Circuit Court of Appeals. And we submit with all due deference, but with the utmost conviction of which we are capable, that the probabilities of error on the part of the Circuit Court of Appeals are so great and the questions thus raised are of such general interest and importance as almost to compel the exercise by this Court of its supervisory powers, in order to review and resolve for itself the jurisdictional issues which have been presented. Otherwise, this case, as decided by the Circuit Court of Appeals, will stand alone as a juridical anomaly, in irreconcilable conflict with not only the jurisprudence of this Court and the Louisiana courts, but with the provisions of the Constitution of the United States, which define the limits of Federal court authority.

Point I

In any case the allowance of a writ of certiorari is a matter which addresses itself to the sound discretion of this Court, but an erroneous assumption of jurisdiction on the part of an inferior court over a case to which its jurisdiction does not extend constitutes a valid basis for such an exercise of this Court's supervisory power in order that the jurisdictional issue may be correctly resolved.

We recognize that lack of jurisdiction is not one of the examples set out in Rule 38 of the Rules of the Supreme Court as illustrating the character of reasons which will be considered by this Court in exercising its sound judicial

discretion as to the allowance of a writ of certiorari. At the same time, it is also true that the courts of the United States are courts of limited jurisdiction, and that no Federal court may deal with any controversy over which it has not been given authority by some constitutional or statutory grant. The following quotation from the land-mark case of *Dred Scott* v. *Sanford*, 62 U. S. 393, 19 How. 393, 15 L. Ed. 691, decided in 1857, with Mr. Chief Justice Taney as the organ of the Court, appropriately summarizes this essential limitation upon the authority of Federal courts:

> "• • • under the Constitution and laws of the United States, the rules which govern the pleadings in its courts, in question of jurisdiction, stand on different principles and are regulated by different laws.
>
> "This difference arises, as we have said, from the peculiar character of the government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the Legislative, Executive nor Judicial Department of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the Judicial Department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. *Hence, when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below.* The

> jurisdiction would not be presumed, as in the case of a common law, English, or state court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution to hear and determine the case." (Emphasis ours)

or, as stated by Mr. Justice Harlan in the case of *Hanford* v. *Davies,* 163 U. S. 271, 16 S. Ct. 1051, 41 L. Ed. 157:

> "• • • It is well settled that, as the jurisdiction of a circuit court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive."

As a result of this fundamental difference in concept between the authority of Federal courts, and that of courts of general jurisdiction, it follows that, in every case arising in the Federal courts, the first question which must be determined is that of jurisdiction; and it is the inescapable duty of any Federal court carefully to scrutinize any case presented to it for decision in order to assure itself that adequate jurisdictional grounds have been established. Authority for this statement, if any be needed, will be found in the case of *Mansfield C. & L. M. R. R. Co.* v. *Swan,* 111 U. S. 379, 28 L. Ed. 462, wherein this Court held:

> "• • • On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. *This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it.* This rule was adopted in Capron *v.* Van Noorden,

> 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked. This case was cited with approval by Chief Justice Marshall in Brown *v.* Keene, 8 Pet. 112." (Emphasis ours)

And the rule is laid down by Judge Rose, in his *Jurisdiction and Procedure of the Federal Courts* (2nd Edition, Sec. 9), as follows:

> "It is the duty of every Court of the United States before which a case cames, whether originally or upon appeal or writ of error, to satisfy itself that upon the face of the record facts appear giving it jurisdiction. If they do not the case may not be further proceeded with until the ommission has been supplied. So soon as the absence of any of the necessary jurisdictional averments is noticed the case must be stopped, it matters not how far it has gone, provided final judgment or decree has not been entered up by the Court before which it is pending.

Such importance has always attached to the question of jurisdiction in any case arising in the Federal courts that, under *Section 238* of the *Judicial Code* (28 U. S. C. A. Sec. 345), as it existed prior to the Amendment of 1925, the Congress made provision for the taking of an appeal or writ of error direct to this Court in any case in which the jurisdiction of the Court was in issue. It is true that the cited section of the Judicial Code has been amended so as to abolish the right of direct appeal formerly accorded in cases in which a jurisdictional question was raised and, obviously, no reliance is being placed upon the cited section to sustain petitioner's claim to the writ which is now

being applied for. Such claim is predicated rather upon the fundamental proposition that, while Federal courts are under a duty to *exercise*, to its full extent, the jurisdiction conferred upon them by the Constitution of the United States and the Acts of Congress not inconsistent therewith, they are at the same time under a corresponding obligation not to *exceed*, in any degree, the jurisdiction which they have been given the authority to assume; from which it follows, as a necessary corollary, that, while any litigant may insist upon the exercise by a Federal court of the full extent of its jurisdiction, he has likewise a corresponding right to be protected against any transgression by a Federal court of its jurisdictional limitations. But we do call attention to the speedy and direct resort to this Court formerly available as a matter of right, under the cited section of the Judicial Code, in order to emphasize the view that, since a direct appeal to this Court, when the jurisdiction of the lower Court is in issue, has been abolished as a matter of right, this Court has thereby been placed under an even greater responsibility to exercise its supervisory powers for the protection of a litigant against an erroneous assumption of jurisdiction by a lower Federal court, and, by means of the writ of certiorari, authorized under *Section 240* of the *Judicial Code* (28 U. S. C. A. Sec. 347), to review and resolve for itself any serious question as to the jurisdiction of the lower Court, when there appears any doubt whatsoever as to the correctness of the lower Court's decision on the jurisdictional issue.

This principle was recognized by this Court in the case of *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000, in which a writ of certiorari was granted apparently for the sole pur-

pose of passing on the question of jurisdiction, since the Court's opinion opens with the following statement:

> "The question presented is whether the District Court had jurisdiction of this suit under the Declaratory Judgment Act."

The requirements for entertainment of jurisdiction by Federal courts in so-called diversity cases are too well known to require the citation of Constitutional or Statutory authority. The following statement by the Circuit Court of Appeals for the Fifth Circuit in the case of *C. E. Carnes & Company* v. *Employers Liability Assurance Corp.* (C. C. A. 5—1939), 101 Fed. (2d) 739, accurately summarizes these requirements:

> "For this insurance company to have a declaratory judgment against the defendants these elements of federal jurisdiction must exist and coexist: First, there must be a diversity of citizenship. Second, there must be, *between the parties litigant,* an actual controversy. Third, the amount involved must exceed the sum of $3,000." (Emphasis ours)

It is our earnest conviction, and we shall undertake in this brief to demonstrate, that of these three elements of jurisdiction, only the last is present in this case; *and that the writ now being sought should and must be granted in order that this suit may be dismissed for lack of jurisdiction.*

But before proceeding with a discussion of the jurisdictional questions present in this case, we believe it necessary first to demonstrate the errors which were committed by the Circuit Court of Appeals in its interpretation of the Louisiana statute, Act 55 of 1930, and in the view which it took of the rights enjoyed by an injured party seeking to avail himself of the Act's provision; and the direct conflict which exists between the conclusions reached by

the Circuit Court of Appeals in this case and the construction theretofore reached by the Louisiana courts in interpreting this statute.

Point II

The Federal Courts sitting in any State are bound: (1) To accept the interpretation placed on a State statute by the highest court of such State; and (2) To apply the jurisprudence of such State (irrespective of statutory construction) as determined by the decisions of its courts of last resort.

Before taking up a discussion of the two fundamental points of conflict between the conclusions reached by the Circuit Court of Appeals and the applicable local decisions, it is probably in order to review the principles of Federal jurisprudence on which we are relying.

In the first place, even before the decision of this Court in the *Erie Railroad Company* case, *infra*, it has always been the established jurisprudence of this and other Federal courts that the interpretation reached by the highest court of a State in construing a statute of such State is binding upon and must be followed by the Federal courts sitting in such state.

For instance, in the case of *Elmendorf* v. *Taylor, et al.*, 10 Wheat. 152, 6 L. Ed. 289, decided in 1825, Mr. Chief Justice Marshall held:

> "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed

to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; *and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true,* unless they come in conflict with the constitution, laws, or treaties of the United States." (Emphasis ours)

Again, in the case of *McCutchen, et al.* v. *Marshall, et al.*, 8 Pet. 220, 8 L. Ed. 923, decided in 1834, this Court in referring to the construction by the Supreme Court of Tennessee of a Tennessee statute, said:

> "This is a judicial interpretation by the highest court in the State, of one of its own statutes, which has always been held by this court as conclusive."

Again, in the case of *Merchants & Manufacturers National Bank of Pittsburgh* v. *Commonwealth of Pennsylvania*, 167 U. S. 461, 17 S. Ct. 829, 42 L. Ed. 236, it was said:

> "It is sufficient to say in reference to this contention that the decision of the Supreme Court of the State of Pennsylvania sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution."

Again, in the case of *Rasmussen* v. *Idaho*, 181 U. S. 198, 21 S. Ct. 594, 45 L. Ed. 820, it was said:

> "The judgment of the Supreme Court of Idaho establishes that there is no conflict between this legisla-

tion and the Constitution of the State, and it is not within the province of this court to review that question."

And in the comparatively recent case of *Georgia Railroad & Electric Company* v. *Decatur*, 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365, it was held:

"In this court, the city insists that, under Georgia law, 'The general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved.' And it seeks to sustain the assessment as an exercise of the police power and the alleged power of the state to alter or amend corporate charters. If the Georgia statutes had been thus construed by the State Supreme Court, a different question would be presented. The difficulty, however, is that the court, as we have said, construed the statute as contemplating the existence of benefits to the railway as a basis for the assessment, but required the railway companies to overcome a legislative presumption that such benefits existed by proof of an arbitrary abuse of the legislative authority 'because of no benefit.' *By that construction we are bound, and in accordance with it must consider and determine the case. The construction becomes a part of the statute as much as though it were found in appropriate words in its text.*" (Emphasis ours)

In the second place, ever since the decision of this Court in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, the Federal courts sitting in any State are bound by and are bound to follow the jurisprudence of the highests courts of such state. This is made clear in the *Erie Railroad Company* case in the following language:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied

> in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law. *Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts.* And no clause in the Constitution purports to confer such a power upon the Federal courts." (Emphasis ours);

and we do not believe that the principle here invoked will be seriously questioned by any one.

From the above citations, it is perfectly clear that:

First, independently of the decision in the *Erie Railroad Company* case, *supra*, the Federal courts sitting in Louisiana are bound by and are bound to accept the interpretation placed by the Louisiana courts upon a statute of that State; and,

Second, under the *Erie Railroad Company* case, *supra*, the Federal courts sitting in Louisiana are bound by and are bound to apply the jurisprudence as laid down by the Louisiana courts, regardless of whether or not that jurisprudence involves the interpretation of a State statute.

With these propositions having been demonstrated, we are brought to an examination of the Louisiana jurisprudence to ascertain what constructions have been placed by the Louisiana courts upon the rights granted by this statute.

Point III

A

The holding by the Circuit Court of Appeals that Act 55 of 1930 is not wholly procedural but confers also a substantive right upon the injured party is in direct conflict with the interpretation given it by the applicable Louisiana courts which have construed this statute as being wholly procedural or remedial in character and conferring no substantive rights.

The initial and only premise assumed in both of our primary grounds of attack upon the jurisdiction of the Federal court in this case was that, under the jurisprudence of the Louisiana courts, the 1930 Act is *wholly remedial or procedural in character and confers no substantive rights*—a premise which was summarily disposed of by the Circuit Court of Appeals with the statement, as found on page 5 of its opinion (R. p. 291), that:

> "The 1930 Act is not wholly procedural, for it confers also a substantive right upon the injured party in the direct action granted such party against the insurer."

And this assertion, by which the Court of Appeals thus rejected the premise upon which our jurisdictional argument was predicated, is not only unsupported by the citation of any authority, but, on the contrary, is in direct conflict with the Louisiana jurisprudence as established in repeated decisions of the courts of last resort in that State.

Understand, we are not here questioning the correctness, *per se*, of the conclusion by the Circuit Court of Appeals, to which we now so strenuously object. If the question were open to decision by that Court, we would perhaps have no valid grounds to seek a review of such decision by this

Court by means of this writ of certiorari, and, were it an open question we concede that the conclusion which the Court of Appeals has thus expressed might be justified, notwithstanding (it might be remarked in passing) that it is in direct conflict with the conclusion previously arrived at by the same Court in the case of *Wells* v. *American Employers Insurance Company* (C. C. A. 5—1942), 132 Fed. (2d) 316. For any Court has the undoubted power to overrule, directly or by implication, any case which it has previously decided, even though its initial decision was correct and the overruling decision erroneous. But the Circuit Court of Appeals has no power or authority to overrule the decisions of the Louisiana courts, and is bound to take that jurisprudence as it finds it and apply it as it has been formulated by the State courts, regardless of whether it agrees or disagrees with such jurisprudence, and regardless of whether such jurisprudence be right or wrong.

Under *Article VII, Sections 10 and 29* of the *Constitution of the State of Louisiana,* the Circuit Courts of Appeal of Louisiana are made the courts of last resort in cases involving claims for damages for personal injuries, subject only to supervisory review by the Supreme Court of the state. There are three (3) Circuit Courts of Appeal in Louisiana, namely, the Orleans Circuit, the First Circuit, and the Second Circuit Courts of Appeal. Their appellate jurisdiction is the same, the only differences between the three courts being those of territorial limitations. And all three of these Courts of Appeal, as well as the Supreme Court itself, have uniformly and without exception held that the statute in question, namely Act 55 of 1930, is purely procedural and confers no substantive rights.

The first case in which the question was presented for decision was that of *Rossville Commercial Alcohol Corporation* v. *Dennis-Sheen Transfer Co., Inc., et al.,* 138 So. 183,

which arose shortly after the adoption of the Act in question and which was decided by the Court of Appeal for the Orleans Circuit in November, 1931. In that case, the defendant's insurer was joined as an additional direct defendant under the provisions of the Act, and the contention was made on behalf of the insurer that the Act could not be invoked since it had not been shown that the policy of insurance then in question had been written subsequent to the adoption of the statute. This contention was set out in the Court's opinion as follows:

> "The insurance company denies that the right to a direct action exists, and argues:
>
> "• • •
>
> "That the act of 1930 can have no retroactive effect, and that, since there is no allegation to show that the policy was issued after the promulgation of the act, it follows that the petition fails to show that the act is to be taken into consideration, and that, if the act be not applicable, there is no right to a direct action.
>
> "That, if the act be given retroactive effect and be interpreted as writing into all policies in force at the time of its promulgation the provisions permitting a direct action, then the act is violative of article 1, Sec. 10, of the Federal Constitution, in that it impairs the obligation of the contract made by the insurance company."

As to this contention, the Court then held:

> "We will consider the various contentions listed above in irregular order, first devoting ourselves to those numbered (2) and (3), because we feel that these should be considered together.
>
> "• • •
>
> "*Matters affecting merely the remedy or the method of procedure have many times been the subject of retrospective legislation,* and, with great unanimity, the courts have held that such legislation is not violative

of the article of the Federal Constitution which we are now considering, and that such legislation does not impair the obligation of contracts. (Citing cases) Likewise is it found that: 'The rule that the terms of a statute or constitution are not to be interpreted as having a retrospective retroactive operation, unless the language used plainly conveys that intention and is susceptible of no other interpretation, finds no application to remedial statutes or to the remedial provisions of organic laws. Remedial laws are an exception to the general rule, and may have retroactive or retrospective force.' *Cassard* v. *Tracy (Cassard* v. *Zacharie)*, 52 La. Ann. 835, 855, 27 So. 368, 377, 49 L. R. A. 272." (Emphasis ours)

"• • •

"We feel that to give retrospective effect to the statute of 1930 would not have the effect of impairing the obligation of the insurance agreement, and we therefore hold that it is immaterial that in the petitions it is not made to appear that the policy in question was issued after the enactment of the statute of 1930. Whether written before or after that statute was passed, it is affected by it."

The Supreme Court of Louisiana thereafter denied an application for certiorari to review this *Rossville* decision, thereby (at least by implication) affirming its correctness.

Thereafter, in 1932, in the case of *Gager* v. *Teche Transfer Company, Inc.*, 143 So. 62, the question was presented to the Court of Appeal for the First Circuit, and in approving the decision which had already been reached by the Orleans Circuit Court of Appeal, that Court said:

"In the case of *Rossville Commercial Alcohol Corporation* v. *Dennis Sheen Transfer Co., Inc., et al.*, 18 La. App. 725, 138 So. 183, 184, the issues here presented by the indemnity company were given full consideration in an elaborate opinion by the Orleans Court of Appeal.

"In passing on the contentions urged by defendant herein, the court said that *the provisions of Act*

> *No. 55 of 1930 merely affected the method of procedure, were remedial, that such statutes are an exception to the general rule, and may have retroactive or retrospective effects,* and that such legislation does not impair the obligations of contracts, citing numerous authorities in support of that conclusion." (Emphasis ours)

The same conclusion was reached by the Circuit Court of Appeal for the Second Circuit also in 1932, in the case of *Rambin* v. *Southern Sales Company, Inc., et al.,* 145 So. 46, wherein the two cases referred to above were cited with approval as expressing the views of that Court.

This conclusion has been reiterated by all of these Courts in various cases since 1932.

For instance, see the case of *Lowery* v. *Zorn,* 157 So. 826 (1934), in which the Court of Appeal, Second Circuit, said:

> "Plaintiff also contends that Act No. 55 of 1930 affects only the remedy or procedure. *In so far as in a proper case the act permits the party injured to join the insurer, the statute is merely remedial. Rossville Comm. Alcohol Corp.* v. *Dennis Sheen Transfer Co.,* 18 La. App. 725, 138 So. 183; *Hudson* v. *Georgia Casualty Co.* (D. C.) 57 F. (2d) 757. (Emphasis Ours)
>
> "But if it is construed to give extraterritorial effect to the jurisdiction of the courts, it becomes more than remedial. *We cannot so construe it."* (Emphasis ours)

or, the case of *Graham* v. *American Employers Insurance Company,* 171 So. 471 (1937), where it said:

> "Plaintiff's counsel contend, however, that Act No. 55 of 1930 reads out of the policy the 'Pay and Satisfy Judgments' Clause and the 'No Action' clause, these constituting the indemnity feature above discussed.
>
> "• • •
>
> "If this contention were true, the cause of action thus afforded to plaintiff against the insurer would flow from the provisions of the statute rather than from

those of the policy. We cannot agree that the statutory provisions have such a far-reaching effect. *The act in question does not furnish substantive rights. Its benefits are procedural in nature. Gager* v. *Teche Transfer Co.* (La. App.) 143 So. 62; *Tuck* v. *Harmon* (La. App.) 151 So. 803, 805. The statute merely gives a *right* of action against the insurer when the claimant has a *cause* of action against the insured." (Emphasis ours)

And see also a re-affirmance of this holding by the Court of Appeal for the First Circuit in the cases of *Gomer* v. *Anding,* 146 So. 704 (1933), and of *Robbins* v. *Short,* 165 So. 512 (1936), in the latter of which that Court held:

"The primary obligation of the insurance company could not be made more onerous by joining it in the same suit with the insured because Act No. 55 of 1930 provides that nothing in the act shall prevent the insurer from urging all defenses against the plaintiff as it could urge if the action was brought against it by the insured himself, nor does the act in any way attempt to enlarge or change the contract of insurance between the insured and the insurer. *This act is purely remedial and does not affect any substantial rights under the contract of insurance. Hudson* v. *Georgia Casualty Company* (D. C.) 57 F. (2d) 757. Nor does the act impair the obligation of contracts. *Rossville Commercial Alcohol Corporation* v. *Dennis Sheen Transfer Co., Inc.,* 18 La. App. 725, 138 So. 183; *Ruiz* v. *Clancy, et al.,* 182 La. 935, 162 So. 734. Emphasis ours)

"• • •

"Our conclusion is that that part of Act No. 55 of 1930 permitting a claimant to join the insurer with the owner of the car under an automobile liability accident policy where a suit for damages is brought *only relates to the form and effect of the action and may be applied by the lex fori,* even though the contract of insurance is governed by a different provision in the policy valid under the laws of the state where entered into." (Emphasis ours)

In addition to its denial of a writ of certiorari to review the *Rossville* decision, as pointed out above, the Supreme Court has had occasion again to pass directly on the point in the case of *Burke* v. *Massachusetts Bonding & Insurance Co.*, 24 So. (2d) 875, 209 La. 495, in which it held:

> *"It is conceded that Act 55 of 1930 is procedural and not substantive, and it is only by virtue of the statute that plaintiff brought her suit in Louisiana."* (Emphasis ours)

From the cases cited above, it will be seen that the three Circuit Courts of Appeal in Louisiana, (which are courts of last resort in personal injury cases), as well as the Supreme Court of Louisiana (which may exercise supervisory powers of review over the Courts of Appeal) have all uniformly and without exception held, in cases where the question has been squarely presented to them for decision, *that the rights accorded by this statute are strictly remedial or procedural and that the statute confers no substantive rights.* The substantive rights, which an injured party may enforce against the insurer company under the remedial provisions of this statute, must be looked for elsewhere in the substantive law.

Although immaterial for the purposes of this discussion (since the jurisprudence of the Louisiana courts is controlling upon Federal Courts sitting in that State), it is interesting, at this point, to note that the Supreme Court of Wisconsin has reached a similar conclusion in construing a similar statute of Wisconsin. The question was presented to that Court by the case of *Oertel* v. *Williams, et al.*, 214 Wis. 68, 251 N. W. 465, decided in December, 1933. In that case the plaintiff, a resident of New York, brought suit in Wisconsin on an accident which occurred in Indiana against Williams and his insurer, as co-defendants. The liability insurance policy there involved had been written

in Wisconsin, where Williams resided at the time. After the policy was written, Williams removed from Wisconsin to Pennsylvania, where he resided at the time of the accident, and at the time of the suit. There was no service on or appearance by Williams in the Wisconsin suit, which plaintiff elected to prosecute solely against the insurer under the "Direct Action" provisions of the Wisconsin statute. The insurer filed a plea in abatement by which it contended that under the law of Indiana (where the accident occurred) it could not be joined as a defendant against its objection, and that if the Wisconsin Direct Action Statute should be construed to cover its policy, "it was unconstitutional in that it impairs the obligation of contracts and amounts to the taking of property without due process of law." The Supreme Court of Wisconsin, in rejecting this contention, held:

> "Whether, under the law of Indiana, the insurer can or cannot, as a matter of procedure, be joined, against its objection, as a defendant in such an action, is immaterial. That is purely a question of procedural law as to which, under the rule that the law of the forum governs all matters relating to the remedy, the conduct of the trial, and the evidence . . . the procedural law of this state is controlling. No sound reason has been stated by the insurer because of which the application of a purely procedural statute, such as Section 260.11, Stats. 1931, to a matter of procedure in this action, which is transitory in its nature, which was commenced in this state after the enactment of that statute, and which is based on a policy issued in this state after such enactment, can be considered a violation of any constitutional provision."

It is also interesting (though likewise immaterial for the reason stated above) to note that the same conclusion has heretofore been reached as to the Louisiana statute by the same Circuit Court of Appeals whose present decision we

now seek to have reviewed. We refer, of course, to the case of *Wells* v. *American Employers Insurance Company* (CCA 5, 1942), 132 Fed. (2d) 316, in which, by a divided Court, it was held:

> "Federal jurisdiction in these cases rests solely upon diversity of citizenship, and we must follow the state law as we find it. So far as that law is substantive we are controlled by the statures and decisions of Louisiana; so far as it is procedural we are guided by the law of Texas, since there is nothing to the contrary in the federal statutes or the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c.
>
> "The court of the forum determines according to its own conflict-of-laws rule whether the question is one of substance or procedure, and, in so doing, will examine the entire transaction before it. This includes the statute of Louisiana creating the right against the insurer and its interpretation by the courts of that state. *So guided and controlled, we hold that the right to sue the insurer directly is procedural, and that the law of the forum governs.*" (Emphasis ours)

True it is that in the *Wells* decision, a dissent was written by one of the judges, who also sat in the case at bar, in which he said:

> "I am unable to agree with the holding that the right to sue the insurance company directly under Louisiana law is merely procedural."

but this dissent merely serves to emphasize the conclusion as then reached that the statute is wholly procedural.

Let us emphasize that we are not here attempting to demonstrate the error *per se* of this conclusion by the Circuit Court of Appeals. For it is no part of petitioner's burden in this case to defend the proposition that this statute *is* wholly procedural and confers *no* substantive rights. We are only called upon to demonstrate that the Louisiana courts have *construed* this statute as wholly pro-

cedural, and that fact *renders* it wholly procedural so far as the Federal courts are concerned, since, under the jurisprudence cited in the preceding Division of this brief, the Federal courts are bound by and bound to accept the State Courts' construction of this statute "as much as though it were found in appropriate words in its text."

Granting for the sake of argument that all of the Louisiana Courts referred to above have, in the course of various opinions involving some reference to this statute, made general references to the rights accorded by this statute, without at the time labelling such rights as procedural, we venture the assertion that no instance can be found in the jurisprudence of Louisiana where any court, in a case in which such question has been squarely presented for decision, has construed this statute as conferring anything other than remedial or procedural rights.

And we now assert and submit that there is no foundation in Federal or State jurisprudence for the statement made by the Circuit Court of Appeals for the Fifth Circuit in the decision now complained of, that the 1930 Act confers also a substantive right on the injured party.

B

The holding by the Circuit Court of Appeals that the rights enjoyed by respondent under Act 55 of 1930 result from her being legally subrogated to the rights of petitioner's insured under the contract of insurance is in direct conflict with the applicable local decisions which hold that such rights are governed by the law of torts.

The Circuit Court of Appeals, in rejecting petitioner's contention that the Federal courts were without jurisdiction of this litigation, used the following language:

> "• • • Equally without merit is the contention that the court below was without jurisdiction, since the actual controversy was one between the insured

and the injured party, both citizens of Louisiana. The Act of 1918, as amended by the Act of 1930, makes the indemnity in favor of the insured *inure to the benefit of the person who thereafter is injured by the negligence* of the insured. *Lawrason* v. *Owners' Automobile Ins. Co. of New Orleans, supra;* and *Merchants Mutual Automobile Liability Ins. Co.* v. *Smart, supra.* In other words, *it subrogates* the injured person to all the rights of the insured within the terms and limits of the policy." (Emphasis by the Court)

Which, we submit, is likewise in conflict with the established jurisprudence of the Louisiana courts. In fact, the error which the Court has here committed seems to us so obvious as to be, in fact, self-evident.

In the first place, it will be noted that the decision in this case must rest upon the provisions of Act 55 of 1930 and not the earlier Act 253 of 1918, which the 1930 Act amended and re-enacted. In order to make this point perfectly clear, we reproduce at this point in parallel columns Section 1 of *Act 253 of 1918* and the same Section of the 1918 Act as it was Amended and re-enacted by *Act 55 of 1930,* and in order to facilitate the Court's comparison of the two Acts, we have emphasized the new provisions which were contained in the amending statute but not originally included in the original act:

Act 253 of 1918	*Act 55 of 1930*
"After the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sus-	"After the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company for the payment of damages for injury sus-

tained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company."

tained or loss occasioned during the life of the policy, *and any judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and* an action may *thereafter* be maintained within the terms and limits of the policy, by the injured person or his or her heirs against the insurer company. *Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits, of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company, alone or against both the assured and the insurer company, jointly and in solido."*

From the above it will be observed that the only right given by the 1918 Act was that in case of the insolvency or bankruptcy of the assured, an action might be maintained within the terms and limits of the policy by the injured party or his or her heirs against the insurer company; whereas, under the amending statute, the action thus accorded was clarified by providing that any judgment which

might be rendered against the assured, for which the insurer was liable and which had become executory, should be deemed *prima facie* evidence of the insolvency of the assured, and that an action might thereafter be maintained within the terms and limits of the policy the injured party or his or her heirs against the insurance company.

But in addition to this right of action in case of insolvency of the assured, the amending statute went further and provided for a right of direct action against the insurer either alone or *in solido* with the assured. And it is only this right of direct action which respondent in this case is seeking to enforce against your petitioner.

If respondent in this case had previously obtained a judgment against petitioner's insured, and were bringing an action under the first sentence of Act 55 of 1930, conceivably, (though not admittedly), it might be held that her action resulted from the principle of subrogation, and conceivably, the cases of *Lawrason* v. *Owners' Automobile Insurance Company of New Orleans*, 172 La. 1076, 136 So. 57, and *Merchants Mutual Automobile Liability Insurance Company* v. *Smart*, 267 U. S. 126, 45 S. Ct. 320, 69 L. Ed. 538, cited in the opinion of the Court of Appeals, might then have some application. But these cases have not the slightest application to the remedial right of direct action provided for in the *second* sentence of the amending statute, and which gives such a remedy irrespective of the insolvency of the insured and without his ever having been sued or even being made a party to the suit.

It seems to us, and we so submit, that there is no conceivable way in which the principle of subrogation can be brought into this case, as the principle of subrogation has no application to the direct action which the amended statute additionally affords an injured party.

Subrogation, by its very definition, means that by operation of law the subrogated party stands in the shoes of the

party to whom he is subrogated, and his right is no greater and no less than the right of the party to whom he succeeds. As stated by this Court in the case of *City of New Orleans* v. *Whitney, Administrator*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102:

> "Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated."

Accordingly, in order to sustain the statement by the Circuit Court of Appeals that this Act "subrogates the injured party to all the rights of the insured within the terms and limits of the policy", and to sustain a "controversy" between respondent and petitioner on the theory of subrogation, it must be held that such "controversy" between respondent and petitioner arises under the law of contracts, since the only rights against petitioner held by its assured, and to which respondent could possibly be subrogated, are those which exist by virtue of the insurance contracts validly entered into between petitioner and its assured. Whereas, if there is one single point on which the Louisiana courts have never wavered, in any case which has ever been presented to them in which this statute has been involved, it is that the injured party's cause of action which he may enforce against the insurer company under the remedial provisions of this statute, *arises under the law of torts and not under the law of contracts.*

Before taking up and citing the cases which so decide, it is perhaps in order to emphasize the statement just concluded by referring to the decision of the First Circuit Court of Appeal of Louisiana in the case of *Bougon* v. *Volunteers of America*, 151 So. 797, wherein it was held:

> "In so far as the language of the statute purports to limit an action by a third person to such as might

> have been brought by the insured against the insurer, it is a manifest absurdity. The foundation of the action of the insured is in contract, to which the injured party is a stranger, except in so far as the statutory provisions may be incorporated in the policy. *The basis of the action by the injured party is negligence, or tort; that of the insured a contract of indemnity.*" (Emphasis ours)

The language quoted above fully demonstrates the error committed by the Circuit Court of Appeals for the Fifth Circuit in its holding now under discussion, but we might additionally point out that the courts of Louisiana have repeatedly held that the cause of action which an injured party may assert under Act 55 of 1930 arises *ex delicto* rather than *ex contractu*.

In *Reeves* v. *Globe Indemnity Company*, 162 So. 724, 182 La 905, the plaintiff, in a similar situation to that occupied by the present respondent, had filed suit against the public liability insurer, alone, of the alleged tort feasor. In her original suit, that plaintiff had failed to allege any of the facts surrounding the alleged accident and had alleged no negligence on the part of the insured. More than one year after the date of the alleged accident, she filed a supplemental and amended petition, giving the details of the cause of accident and setting out the alleged gross neglience on the part of the driver of the car. Thereupon the defendant pleaded the prescription of one year provided by the Louisiana Code for claims arising *ex delicto*, which plea was sustained by the lower Court and the suit dismissed. Plaintiff then appealed to the Supreme Court of Louisiana, instead of to the Circuit Court of Appeal, on the theory that her cause of action against the insurance company was based on the contract of insurance rather than on a tort. There she was met with a motion to dismiss the appeal on the ground that that Court was without jurisdiction *ratione*

materiae. The Supreme Court, in sustaining this contention, held that the suit was one for damages for physical injuries, and not within its appellate jurisdiction.

The appeal was therefore transferred to the Court of Appeal, which affirmed (*Reeves* v. *Globe Indemnity Company*, 164 So. 642) the decision of the trial Court sustaining the plea of prescription, and the case came once again to the Supreme Court on a writ of certiorari. (*Reeves* v. *Globe Indemnity Company*, 168 So. 488, 185 La. 42). That Court, while overruling the plea of prescription, reaffirmed its previous holding that the cause of action was one *ex delicto* rather than *ex contractu*, saying:

> "It appears clear to us that both the original and supplemental petitions assert one and the same right or cause of action, i.e., a claim for damages for personal injuries and medical expenses resulting from the alleged accident. The original and supplemental petitions deal with one and the same demand, which is essentially and fundamentally a tort action. The policy of liability insurance covers such claims by its very terms. Act No. 55 of 1930, which gives the plaintiff the right to proceed directly against the insurance carrier, expressly covers cases of this kind, *i. e.*, actions *ex delicto*. *The policy is incidental to the main demand which is basically a tort action, because there can be no liability either on the part of the insured or insurer, unless the insured or his agent were at fault in causing the plaintiff's injury and loss.*" (Emphasis ours)

And in the case of *Burke* v. *Massachusetts Bonding & Insurance Company*, 24 So. (2d) 875, 209 La. 495, cited *supra*, this doctrine was reaffirmed in the following language:

> "The decision of the Court of Appeals on the question of no right or cause of action is also clearly correct. *Plaintiff's action is one arising ex delicto and not ex contractu. Metropolitan Casualty Ins. Co.* v. *Bowdon*, 181 La. 295, 159 So. 394; *Reeves* v. *Globe Indemnity*

Co., 182 La. 905, 162 So. 724; *Reeves* v. *Globe Indemnity Co.*, 185 La. 42, 168 So. 488." (Emphasis ours.)

It, therefore, seems clear that, under the Louisiana jurisprudence, the alleged controversy between this complainant and this defendant is dependent upon and governed by the substantive law of torts; and under the doctrine of the *Erie Railroad Company* case, cited *supra*, this jurisprudence is binding upon and must be followed by the Federal courts sitting in Louisiana.

Under this jurisprudence the error of the Circuit Court of Appeals' holding that respondent's action under this statute rests on the principle of subrogation becomes obvious.

Point IV

Since Act 55 of 1930 is strictly procedural or remedial in character and confers no substantive rights, the jurisdiction of a Federal court, when selected by an injured party as the forum for the enforcement of the remedy granted him by the statute, must be determined from a consideration of such injured party's actual controversy, as it arises under the applicable substantive law.

By holding that this statute is not wholly procedural and that it confers a substantive right upon the injured party in the direct action granted such party against the insurer, the Circuit Court of Appeals has perhaps avoided a direct conflict between its decision and the decisions not only of other Circuit Courts of Appeals, but of this Court as well. For, if this statute could be construed as within itself conferring substantive rights, then it might be deemed the basis for a "controversy" justiciable in the Federal courts. But we have already shown that under the Louisiana jurisprudence such an assumption cannot be sustained, and when the Court's ultimate conclusions are deprived of the sup-

port of this erroneous hypothesis, the conflict now referred to becomes immediately and inescapably apparent.

Some understanding of this statute in the procedural or remedial aspect in which it has been interpreted by the Louisiana courts is necessary at this point.

For this purpose it may be conceded that the statute is not procedural in the sense that it deals with the forms of process, the admissibility of evidence, or the conduct of the trial, all of which are concepts which are automatically called to mind when a statute is thought of as procedural. But it is procedural or remedial in the sense that, under the construction placed upon it by the Louisiana courts, it simply affords a procedural vehicle for the remedial enforcement against the insurer company of a cause of action or "controversy" otherwise arising under the substantive law.

Without this statute such "controversy" as the injured party enjoys will nonetheless exist; and *with* this statute no "controversy" is created in his behalf which does not otherwise arise. *Without* this statute the insurer company cannot be sued directly unless the applicable substantive law should provide the injured party with a case against or controversy with the insurer company; but the statute is not substantive, and even *with* this statute the insurer company cannot be sued directly unless the applicable substantive law provides the injured party with a case against or controversy with the assured. The statute itself, as it has been construed by the Louisiana courts, simply provides that such "case" or "controversy" as otherwise exists against the assured under the substantive law can be enforced or proceeded with directly against the insurer company; it neither enlarges nor restricts the substantive law.

This view of the act was clearly expressed by the Supreme Court of Louisiana in the recent case of *Burke* v. *Massa-*

chusetts Bonding & Insurance Company, 24 So. (2d) 875, 209 La. 495, cited *supra.* The facts in that case, as stated by the Court, were as follows:

> "The plaintiff, Stella Herson Burke, while in an automobile owned and driven by her husband, E. S. Burke, was severely injured when the automobile collided with a school truck owned by Alcorn A. & M. College in Claiborne County, Mississippi. The accident occurred near the college on August 17, 1941, and on January 30, 1942, plaintiff, alleging that the accident was caused solely by the negligence of her husband, brought suit in the district court for the Parish of East Baton Rouge against the Massachusetts Bonding & Insurance Company, her husband's liability insurer."

The trial Court and the Court of Appeal (*Burke* v. *Massachusetts Bonding & Insurance Company,* 19 So. (2d) 647) sustained an exception of no cause or right of action filed by defendant based on the contention that under the law of Mississippi plaintiff enjoyed no cause of action against her husband and as a consequence likewise had no cause of action against his insurer. The Supreme Court granted certiorari to review this decision, and in affirming the conclusions of the Court of Appeal, said:

> "The decision of the Court of Appeal on the question of no right or cause of action is also clearly correct. Plaintiff's action is one arising *ex delicto* and not *ex contractu. Metropolitan Casualty Ins. Co.* v. *Bowdon,* 181 La. 295, 159 So. 394; *Reeves* v. *Globe Indemnity Co.,* 182 La. 905, 162 So. 724; *Reeves* v. *Globe Indemnity Co.* 185 La. 42, 168 So. 488. Where the action is brought in one jurisdiction for a tort committed in another the rights and liabilities of the parties are determined by the laws of the place where the wrong is committed and not by the laws of the place where the right of action is asserted. *11 Amer. Jur.,* sec. 490, p. 182; *American Law Institute, Conflict of Laws,* sec. 384,

p. 470. In the latter comprehensive work the rule is concisely stated as follows: 'If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.' We must therefore look to the laws of Mississippi where plaintiff's injury occurred and not to the laws of Louisiana where the plaintiff's suit was brought in order to determine plaintiff's rights.

" • • •

"It is conceded that Act 55 of 1930 is procedural and not substantive, and it is only by virtue of the statute that plaintiff brought her suit in Louisiana. Plaintiff insists that since the statute creates no substantive right, the case must be governed by the law of the place where the remedy is sought. *But the statute merely gives a claimant a direct right of action against the liability insurer when he has a cause of action against the insured,* or where the insured would be liable but for an immunity personal to him. The statute does not give plaintiff any more rights than she has under the law of Mississippi. It only furnishes her with a method to enforce in Louisiana whatever rights she has in Mississippi. Since she has no cause of action under the law of Mississippi, necessarily Act 55 of 1930 confers upon her no cause of action in Louisiana. *The mere fact that under the statute plaintiff was able to obtain jurisdiction against her husband's liability insurer in a direct action in this State does not create, as against her husband, or as against his insurer, a substantive cause of action that does not exist under the law of the state where the wrongful act occurred.*" (Emphasis ours)

The conclusions here reached by a court of general jurisdiction are even more impelling upon a court of limited jurisdiction; and a little reflection will reveal that these conclusions have in fact been reached by the Federal courts.

For in the procedural sense now being considered this statute is analogous to the various Declaratory Judgment

Statutes which are likewise procedural or remedial in character, and which have been enacted simply to afford a convenient procedure or remedy for the ascertainment and enforcement of rights or "controversies" arising under other substantive laws, but which under normal procedures would not be susceptible of adjudication and enforcement by the Courts. With this concept of the procedural or remedial character of this statute, it is obvious that the decisions of this Court on the jurisdictional questions which have arisen with regard to Declaratory Judgment Acts (particularly those of the various states) are squarely in point with the case at bar. The various Declaratory Judgment Acts confer no substantive rights and have always been construed as being wholly procedural or remedial rather than jurisdictional in character, just as the statute now under discussion has been construed by the Louisiana courts. And in passing upon the enforceability by the Federal courts of the remedies or procedures provides by such statutes, your Honors have definitely established that a procedural statute is not jurisdictional, and does not afford, within itself, the basis for any "case" or "controversy" within the meaning of the Constitution. And, accordingly, it is held that the Federal courts must look behind the provisions of such a statute and determine whether, under the applicable substantive law, a "case" or "controversy" is otherwise presented of which they may, under the Constitution, take jurisdiction.

The case of *Liberty Warehouse Company* v. *Grannis*, 273 U. S. 70, 47 S. Ct. 282, 71 L. Ed. 541, decided by this Court in 1926, illustrates the principles to which we now allude. In that case a proceeding was commenced by plaintiffs in error in the District Court of the United States for the Eastern District of Kentucky, seeking to obtain a judgment declaring their rights under an Act of the Kentucky Legislature. The procedure adopted was authorized by the

Declaratory Judgment Law of Kentucky, and application was made to the Federal court in accordance with the Federal Conformity Statute and this Declaratory Judgment Law of Kentucky, for the purpose of securing a declaration of plaintiffs' rights and duties under a Kentucky Act of 1924, and of having the Court determine other questions which they raised as to the validity of the Act. The defendant was the Commonwealth attorney, who was alleged to be the representative of the Commonwealth with the duty of enforcing the Act under attack. The defendant demurred to the petition on the ground, among others, that the Court had no jurisdiction of the cause of action set forth, having no power or authority as a Federal court to entertain a proceeding for a declaration of the rights of the parties or to act under the provisions of the Declaratory Judgment Law of Kentucky. This demurrer was sustained and the case was taken on direct writ of error to this Court, under Section 238 of the Judicial Code before the amendment made by the Jurisdictional Act of 1925 became effective.

In rejecting the Declaratory Judgment Law of Kentucky as within itself constituting the basis for controversy within the jurisdiction of the Federal courts, this Court held:

> "Manifestly the Federal Conformity Statute, Rev. Stat. Sec. 914, Comp. Stat. Sec. 1537, 6 Fed. Stat. Anno. 2d ed. p. 21 (U. S. Code, title 28, Sec. 724, conferred upon the court no jurisdiction to proceed in accordance with the Declaratory Judgment Law of Kentucky. *This statute relates only to 'practice, pleadings, and forms and modes of procedure'; and neither purports to nor can extend the jurisdiction of the district courts beyond the constitutional limitations.* See *Southern P. Co.* v. *Denton*, 146 U. S. 202, 209, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Mexican C. R. Co.* v. *Pinkeny*, 149 U. S.

194, 206, 37 L. ed. 699, 703, 13 Sup. Ct. Rep. 859." (Emphasis ours)

And in affirming the lower Court's judgment of dismissal, this Court looked behind the procedural act and, upon examination of the alleged substantive rights which the plaintiffs in error were seeking to have adjudicated, found that the complaint as originally filed disclosed no substantive "controversy" to which the judicial power of the Federal courts might extend. The following excerpts from the opinion make this holding perfectly clear:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. * * *
>
> "The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court.
>
> "We need not review these at length. It suffices to say that . . . it is not open to question that the judicial power vested by Article 3 of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and *does not extend to the determination of abstract questions or issues framed for the purpose*

of invoking the advice of the court without real parties or a real case.'' (Emphasis ours)

"• • •

"It follows necessarily from these decisions that the District Court, as a court of the United States established under article 3 of the Constitution, had no jurisdiction to entertain the petition for the declaratory judgment."

The principles of this *Liberty Warehouse Company* case were reaffirmed by this Court in the case of *Nashville C. & St. L. R. R. Co.* v. *Wallace,* 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191, in which this Court was again called upon to review on appeal a proceeding had under a Declaratory Judgment Law, this time from the State of Tennessee. In that case, the Court again recognized that the Declaratory Judgments Act of Tennessee, in itself, could confer no jurisdiction on the Federal court, as is evidenced from the following statement appearing at the inception of its opinion:

"After the jurisdictional statement required by Rule 12 was submitted, this Court, in ordering the cause set down for argument, invited the attention of counsel to the question 'whether a case or controversy is presented in view of the nature of the proceedings in the state court.' This preliminary question, which has been elaborately briefed and argued, must first be considered, for the judicial power with which this Court is invested by Art. 3, Sec. 1 of the Constitution, extends by Art. 3, Sec. 2, only to 'cases' and 'controversies;' if no 'case' or 'controversy' is presented for decision, we are without power to review the decree of the court below. *Muskrat* v. *United States,* 219 U. S. 346, 55 L. ed. 246, 31 S. Ct. 250;"

and again held that in determining the question of jurisdiction it must look behind the procedural statute and determine

the substance of a controversy in order to resolve the jurisdictional question, as follows:

> "In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. See *Fidelity Nat. Bank & T. Co.* v. *Swope*, 274 U. S. 123, 71 L. ed. 959, 47 S. Ct. 511, compare *Gasoline Products Co.* v. *Champlin Ref. Co.* 283 U. S. 494, 498, 75 L. ed. 1188, 1190, 51 S. Ct. 513. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as 'declaratory', but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts."

But in this case, as distinguished from the *Liberty Warehouse* case, the Court concluded that the substantive rights presented for adjudication under the procedural statute then being invoked did evidence a "case" or "controversy" within the scope of the Constitutional limitations upon the authority of United States courts, its conclusion being expressed in the following language:

> "That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned";

and, as a consequence, it held that the Federal court did have jurisdiction of the matter there presented under the procedural statute there involved.

More recently, in the case of *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000, which involved an application of the remedial rights granted by the Federal Declaratory Judg-

ment Act, these principles were reaffirmed in the following language:

> "The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' . . . The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestiy has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. *Thus the operation of the Declaratory Judgment Act is procedural only.* . . . (Emphasis ours)
>
> " • • •
>
> "With these principles governing the application of the Declaratory Judgment Act, *we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the instant case.*" (Emphasis ours)
>
> "There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. . . ."
>
> ". . . Whether the District Court may entertain such a suit by the insurer, when the controversy as here is between citizens of different States or otherwise is within the range of the federal judicial power, is for the Congress to determine. *It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative.*" (Emphasis ours)

These principles have been also recognized and applied by various Circuit Courts of Appeals, including the Court which rendered the decision now complained of.

For instance, in the case of *Southern Pacific Company* v. *McAdoo* (C. C. A. 9—1936), 82 Fed. (2d) 121, the holding

is accurately summarized by the syllabus, which reads as follows:

> "Federal court was without jurisdiction of proceeding for declaratory judgment under California statute, unless proceeding presented a 'case' or 'controversy' within meaning of Constitution and amount in controversy exceeded $3,000 exclusive of interest and costs and requisite diversity of citizenship existed."

Or, see the case of *C. E. Carnes & Co.* v. *Employers Liability Assurance Corp.* (C. C. A. 5—1939), 101 Fed. (2d) 739, where the Court sustained its jurisdiction to enter a declaratory judgment, sought by an insurer company (situated as petitioner is here), decreeing that coverage did not exist under the policy there involved and enjoining the defendants (situated as are respondent and petitioner's assured in this case) from "asserting any rights against the plaintiff herein under said policy arising out of said accident." The Court specifically pointed out that Act 55 of 1930 had no application since the "controversy" there involved related to the coverage *vel non* of the policy and did not arise from the alleged tort liability of the assured to the injured party, as will be seen from the following quotation:

> "The insurance company being a foreign corporation and each of the defendants citizens of Louisiana, there is a diversity of citizenship. By Louisiana law each of the defendants have an interest in this insurance policy and in the outcome of this suit. The amount involved is not, as appellants contend, what individual defendants claim by way of damages. This is not a tort action at all and the question of negligence *vel non* is not before us. The amount in controversy is the value of that which is sought to have declared free from doubt —the policy for $25,000. *The Louisiana Statutes providing that one bringing a suit for damages may sue the tort-feasor separately, or bring his suit against the*

> *tort-feasor and the insurance company, or against the insurer alone, have no argumentative force here;"* (Emphasis ours.)

thus holding, at least by implication, that had the "controversy" there involved been dependent upon the law of torts, its jurisdiction could not have been maintained since the necessary diversity of citizenship did not exist between that assured and the injured party, both of whom had been made defendants.

And in the case of *Thompson, et al.* v. *Moore,* (C.C.A. 8—1940), 109 Fed. (2d) 372, with which, in our view, the present case is on all fours and squarely in conflict, it was held:

> "The Declaratory Judgment Act (*Judicial Code,* Section 274d, 28 U. S. C. A. Sec. 400) under which the action was brought is procedural and not jurisdictional. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; *American Automobile Ins. Co.* v. *Freundt,* 7 Cr., 103 F. 2d 617.
>
> "If the 'actual controversy' is between a citizen of Arkansas on one side, and another citizen of Arkansas and appellants on the other side jointly, the district court was without jurisdiction. • • •"

From the jurisprudence cited above, it becomes, we submit, abundantly clear that a procedural statute is not jurisdictional so far as Federal court jurisdiction is concerned; and that in order to sustain its jurisdiction when a procedural statute is invoked, a Federal court must look behind the statute and determine the question of its jurisdiction by an examination into the controversy as it is presented under the applicable substantive law.

Point V

Under the substantive law of torts in Louisiana the only controversy enjoyed by respondent is one with petitioner's assured, and the jurisdiction of the Court below must, therefore, depend upon a diversity of citizenship between respondent and petitioner's assured.

Having demonstrated that, as construed by the Louisiana courts, Act 55 of 1930 is strictly procedural or remedial; that the Federal courts siting in Louisiana are bound by this construction; that a procedural or remedial statute confers in itself no jurisdiction on the Federal courts; that the justiciable character of the controversy for the assertion of which such a statute afford a remedy must be determined by reference to the applicable substantive law; and that under the Louisiana jurisprudence the substantive law applicable to the controversy here presented is the substantive law of torts; it remains but to gather up the "loose ends", so to speak, of our argument in order to demonstrate that the Federal courts are without jurisdiction in the present case.

The substantive law of torts in Louisiana is embraced in *Article 2315 of the Revised Civil Code* of that State, the pertinent portion of which reads as follows:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; * * *"

And the most casual consideration of this Article discloses that the only "case" or "controversy" enjoyed by this respondent, as the injured party, is a case against or controversy with petitioner's assured, Louis O. Campbell, in his capacity as an alleged tort-feasor. This Article plainly provides no "case" or "controversy" between respondent and petitioner.

Accordingly, when respondent sought to avail herself of the procedural rights granted her by Act 55 of 1930 and to enforce in the Federal court the remedial provisions of this Act, she was required to allege and prove as a prerequisite to the assumption of jurisdiction by such Court a diversity of citizenship between herself and Louis O. Campbell, petitioner's assured, rather than a diversity of citizenship between herself and petitioner.

As we have already pointed out, under Article II of her original complaint (R. p. 2) respondent alleged that she and her minor son were "both residents of the Parish of Evangeline, Louisiana", and under Article III of this complaint (R. p. 3), it was alleged that Louis O. Campbell, petitioner's assured, was also "a resident of the Parish of Evangeline, Louisiana". This, far from alleging a diversity of citizenship between these parties, alleges in fact a community of citizenship between them, and as a consequence the lower Court was wholly without jurisdiction of the only "controversy" here presented, and this suit must be dismissed for lack of jurisdiction.

POINT VI

Respondent here could not invoke an exercise of the remedy granted her by Act 55 of 1930 without at the same time accepting the conditions attached by the statute itself as to the place in which the suit should be brought, and accordingly, her suit under this statute could not be instituted initially in a Federal court.

We have already pointed out that the argument made to the Court below on the jurisdictional question here raised were not answered or even referred to by the Circuit Court of Appeals in its opinion in this case. As a consequence, we are unable to comment upon the Court's reasons for rejecting this argument or point out any affirmative errors in the Court's opinion in respect to this contention.

We do feel, however, that the objection here raised is perfectly sound and of sufficient importance to justify a summarization in this brief of the argument presented to the Court below.

The argument now urged is based upon the language of the Act which complainant is seeking to invoke. This Act has been quoted in full in our petition, but in order to emphasize the portions to which we now refer, we repeat the following excerpt from this Act:

> "Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, *in the parish where the accident or injury occurred, or in the parish where the assured has his domicile,* and said action may be brought either against the insurer company, alone or against both the assured and the insurer company, jointly and in solido." (Emphasis ours.)

The above language, as used by the Legislature, at once poses the question which was raised by the Circuit Court of Appeal for the Fourth Circuit, in the case of *Guilfoil* v. *Hayes* (C. C. A. 4 1936) 86 Fed. 2d 544, in the following language:

> "It is to be noted that the statute which authorizes the suit also provides that such suit shall be filed in the court in which, or in the clerk's office of which, the will was admitted to probate. *The question at once presents itself whether the plaintiff can avail herself of the privilege, given by the statute, of bringing the suit in equity without accepting the condition attached by the statute itself as to the place in which the suit shall be brought.*" (Emphasis ours.)

The question here asked has been expressly answered by the Supreme Court of Louisiana in the case of *Miller* v. *Com-*

mercial Standard Insurance Company, 6 So. (2d) 646, 199 La. 515.

In that case the plaintiffs, being citizens of the State of Minnesota, brought suit against the insurance company alone, it being a foreign corporation domiciled in Texas. The collision which was the subject of that suit had taken place in the Parish of Iberia, and the assured, who was not a party to the suit, was domiciled in the Parish of Vermillion. Plaintiffs had brought their suit in the Parish of East Baton Rouge, that being the legal domicile of the Secretary of State, the agent for service in Louisiana of the foreign insurance company. The Supreme Court squarely held that the venue of the case could not be laid in the Parish of East Baton Rouge, and that the provisions of the statute had to be strictly complied with in order for plaintiffs to avail themselves of the remedy provided thereby. Pertinent quotations from the holding in that case follow:

> "• • • The statute which gives them the right to proceed against the company directly is Act No. 253 of 1918, as amended and reenacted by Act No. 55 of 1930, the act as amended reading in part as follows:
>
> "Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms and limits of the policy, *in the parish where the accident or injury occurred, or in the parish where the assured has his domicile,* and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido." (Court's emphasis.)
>
> *"The plaintiffs in bringing their suits took advantage of the provisions of this statute and brought them against the insurance company, and against it alone, and, having done so, they are bound by its provisions relating to the place where such suits are to be brought.* (Emphasis ours)

"• • •

"If, by writing into the act this special provision, the Legislature did not intend that such actions should be brought only in the parish where the insured has his domicile and not elsewhere, then that provision of the act was inserted for no purpose at all.

"• • •

"We can think of no reason, and none has been suggested to us by counsel, why the Legislature said in the 1930 act that the injured person or his or her heirs shall have a right of direct action against the insurer company 'in the parish where the accident or injury occurred, or in the parish where the assured has his domicile', if it did not intend that they should not have such right of action elsewhere.

"• • •

"The Legislature must have had some purpose in putting into the act, without mentioning the domicile of the company, the provision to which we have referred. *Our opinion is that its purpose was to change the 'existing rule' and to limit the jurisdiction of such suits to the parishes mentioned in the act.*" (Emphasis ours)

In that case, the decision was by a divided Court, with four of the justices concurring only in the result, but as to the question of jurisdiction, the Court was unanimous. Two concurring opinions were written, one by Chief Justice O'Niell in which he disposed of this question in the following language:

"I concur in the opinion that the district court in the Parish of East Baton Rouge has not jurisdiction in this case. There is no contractual relation between the insurer and an injured person in the case of public liability insurance; *hence the injured person has no right of action against the insurer except the right which is conferred by Act No. 55 of 1930,—to sue the insurer 'in the parish where the accident or injury oc-*

curred, or in the parish where the assured has his domicile.'" (Emphasis ours)

and the other by Justice McCaleb, in which the question of jurisdiction was discussed as follows:

> *"It is my opinion that the actions sound in tort under Article 2315 of the Civil Code. The only reason why the suits may be brought directly against the defendant insurance company is because of the special provisions of Act No. 55 of 1930.* The right accorded by that statute to sue the insurance company directly does not change, and should not be held to convert, the plaintiffs' cause of action from one in tort to a case in contract under an accident insurance policy. *Plaintiffs' cause of action remains the same.* The statute merely grants to plaintiffs an additional privilege to proceed not only against the wrongdoer but also against the company indemnifying him against loss within the terms and conditions of the insurance policy. *In creating this additional right, the Legislature restricted the plaintiffs' choice of the forums where the right could be asserted* at their option to the parish in which the alleged tortfeasor or assured resided or the parish in which the accident occurred. Clearly, the Parish of East Baton Rouge where the insurance company has its domicile has no jurisdiction of the cause." (Emphasis ours)

It is true that in the case of *Anderson* v. *Standard Accident Insurance Company* (1940) 36 Fed. Supp. 7, Judge Caillouet, of the Eastern District of Louisiana, maintained the right of his Court to jurisdiction in a case of this kind, but there is nothing in his decision to indicate that the jurisdictional question, as here raised, was appropriately presented to him, and, moreover, his conclusions were based, at least in part, upon the provisions of Paragraph 10 of Article 165 of the Code of Practice of Louisiana, and the Louisiana Supreme Court, in the *Miller* case, cited *supra*, squarely held that the provisions of that Article were not

applicable to a case of this kind and that a plaintiff situated as respondent is could avail himself of the remedy granted by Act 55 of 1930 only in the court provided for by the express terms of that Act.

The question now being discussed is not new.

The Federal courts have repeatedly recognized that a state, by express statutory provision, may provide for a particular remedy or for a particular mode of procedure, and for resort by the plaintiff to a particular tribunal to enforce such remedy or procedure, even though such a statute might incidentally defeat the plaintiff's right to institute the suit originally in the Federal courts.

The question has come before the Federal courts in cases involving the right to removal. The Federal courts have jealously guarded their right to assume jurisdiction on applications on the part of defendants for removal to the Federal court, and have quite properly held that *the fact that the remedy sought could not have been originated by the plaintiff in the Federal Court cannot defeat the defendant's right to invoke the jurisdiction of such court on an application for removal.* The holding is predicated on the proposition that matters of procedure are not jurisdictional but personal, and may be waived by the parties, and that while a defendant might have the right to insist upon a strict compliance with the statutory provisions, nevertheless, such right could be waived and would not avail to defeat the right of defendant himself to invoke the jurisdiction of the Federal court where other jurisdictional requirements were present.

For instance, in the case of *In re Stutsman County, North Dakota* (1898), 88 Fed. 337, District Judge Amidon of the District of North Dakota held (p. 341):

> "• • • It has been uniformly held that matters of procedure are not jurisdictional, but personal, and

> are subject to waiver by the parties. * * * *So, notwithstanding the proceeding under the North Dakota statute for the collection of taxes is of such a character, owing to its procedure, that it could not be commenced in the federal courts,* the controversy which has been removed by the petitioners presents every element mentioned in the first section of the judiciary act as essential to original jurisdiction, and jurisdiction on removal is therefore complete." (Emphasis ours)

Again in the case of *Union Terminal Railway Co.* v. *Chicago B. & O. Railroad Company* (1902), 119 Fed. 209, District Judge Phillips of the Western District of Missouri said (p. 215):

> "Another difficulty in the mind of the writer of this opinion, when the motion to remand was first argued, was that the legislature of the state by its statute, which conferred upon this local corporation the right of eminent domain, a right in derogation of the common law, and *the statute which conferred the right having prescribed the mode of enforcing and enjoying that right, to wit, by presenting a petition to the circuit court of the county where the land is situated,* or to the judge thereof in vacation, *was mandatory on the plaintiff,* and that, as it might not be permitted to lodge such a petition in the first instance in the circuit court of the United States, the nonresident defendant, under the literal application of the broad language of the court in Railroad Co. *v.* Davidson, *supra,* was not entitled to remove the cause. This we are satisfied, on further examination, was a misconception." (Emphasis ours.)
>
> *"It may be conceded that the resident corporation, seeking the exercise of the right of eminent domain, which comes alone from the grant of the sovereign, is compelled to pursue the remedy prescribed by the sovereign,* upon the well-recognized principle 'that when a statute gives a new and extraordinary remedy, and directs how the right to the remedy is to be ac-

quired or enjoyed, how it is to be enforced, that act should be strictly construed; and the steps pointed out for the enjoyment of the remedy provided should be construed as mandatory rather than directory or optional.' " (Emphasis ours.)

And in the case of *Commissioners of Road Improvement District No. 2* v. *St. Louis Southwestern Railway Company*, 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364, this Court recognized the principle of law here involved and cited with approval the *Stutsman County* case, *supra*.

From the foregoing, it seems to us clear that, while venue provisions of the character included in this statute might not prevent the removal by a defendant of a particular case to the Federal Court (where Federal jurisdiction otherwise exists), they are nonetheless mandatory upon a complainant in his initial selection of a forum to enforce the procedural rights granted by such a statute.

Such a construction of a strictly remedial or procedural statute is in accord with the fundamental rules of statutory construction. It has already been demonstrated in the preceding part of this brief that Act 55 of 1930 is strictly a remedial statute and simply confers upon a plaintiff an additional remedy without conferring upon him any additional substantive rights. And it is clear from the Louisiana cases heretofore cited, particularly the case of *Miller* v. *Commercial Standard Insurance Company*, 6 So. 2d 646, 199 La. 515, that the statute provides a new and extraordinary remedy otherwise unknown to our law. Under these circumstances, it falls into the category of statutes which must be strictly construed. The rule is stated in 59 C. J. 1130, verbo Statutes, Section 669, as follows:

"• • • But statutes which take away, change, or diminish fundamental rights, statutory remedies for rights unknown to the common law, and statutes which provide new and extraordinary remedies, must be con-

> strued strictly, both as to the cases embraced within their terms and as to the methods to be pursued."

and this rule of construction was recognized by the Circuit Court of Appeals for the Sixth Circuit in the case of *Campbellsville Lumber Company* v. *Hubbert* (CCA 6—1902), 112 Fed. 718, the syllabus of which reads as follows:

> "When a statute gives a new and extraordinary remedy, and directs how the right to the remedy is to be acquired and enjoyed, the act should be strictly construed, and the steps pointed out for the enjoyment of the remedy provided should be construed as mandatory, rather than directory or optional."

and this is supported by the following language taken from the decision:

> "An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under the authority of such an act will depend upon a compliance with its terms. *In respect to such acts the steps pointed out for the acquisition, preservation, and enforcement of the remedies provided should be construed as mandatory, rather than optional.*" (Citing cases.) (Emphasis ours.)

Thereafter, on the application of Hubbert, this Court granted certiorari and in the case of *Marc Hubbert* v. *Campbellsville Lumber Company*, 191 U. S. 70, 24 S. Ct. 28, 48 L. Ed. 101, affirmed the decision of the Court of Appeals, saying:

> "• • • That the authority in this amendatory act to proceed directly against the several owners of property in the county is not an ordinary remedy for the collection of bonds is true of the state of Kentucky

> and generally of the states of the Union. Indeed, the original act gave something more than the ordinary remedy, and when the amendatory act provides for what must be conceded is, under the circumstances, an extraordinary remedy, *it would seem reasonable to hold that all the provisions of the statute which grant such remedy should be complied with before it can be considered as contracted for.*" (Emphasis ours.)

We submit in all sincerity and with all due respect, that the reasons assigned by the District Judge for overruling the motion to dismiss filed by petitioner wherein the following language was used (Tr. p. 21):

> "We believe that Act 55 of 1930, though strictly procedural, in essence becomes a real and substantive right to a resident of Louisiana when viewed in that citizen's behalf, so that he be enabled, because of the amount of $3000 exclusive of interest being involved, to enter the Federal court—the diversity of citizenship generally existing because the insuring company is usually a non-resident of the State of Louisiana.
>
> "So, because of the fundamental right of the Louisiana citizen to enter a Federal court to vindicate his rights, when diversity of citizenship and an amount of over $3000 exists, we must overrule the motion to dismiss. Sect. 41 (1), Tit. 28, U. S. C. A., Judicial Code, s 24 (1)."

involved two fundamental misconceptions, both of which have been demonstrated in the jurisprudence cited in this and previous divisions of this brief:

First, this statute is strictly procedural and cannot under the law become "in essence a real and substantive right to a resident of Louisiana," or of any other state.

Second, a citizen of Louisiana has no fundamental right to enter a Federal court to vindicate his rights where such action would involve a disregard by the Court of funda-

mental statutory construction in order for it to assume jurisdiction.

As to the first of these propositions, there would seem to us to be no room for doubt in view of the decisions cited in previous Divisions of this brief. And the second proposition seems to us amply demonstrated by the decisions cited in the present Division of this brief.

The only fundamental right accorded to a citizen of Louisiana by Act 55 of 1930 carries with it the corresponding limitation as to the Court which he may enter to enforce such right. And a citizen of Louisiana seeking to avail himself of the privileges granted by this statute has no more fundamental right to enter the Federal Court than a citizen of any other state. As a matter of fact, the fundamental right to enter the Federal courts probably belongs to the non-resident defendant rather than to the complainant citizen of the state in which the Federal court is sitting, but that particular issue involves an academic discussion which is not pertinent to the questions here presented.

Irrespective of any question as to the fundamental right of either a resident or non-resident to enter the Federal courts for a vindication of his grievances, we submit that the limitations as to the selection of a forum provided by this statute (Act 55 of 1930) are mandatory upon any plaintiff seeking to avail himself of its remedial procedure, and that even though the selected defendant might waive these mandatory provisions and remove the case to the Federal court, it must be instituted originally in one or the other of the particular courts specified by the statute, and that as a consequence, this respondent could not maintain her suit in this Court over the objection of this petitioner.

In the case of *Dean* v. *Bituminous Casualty Company*, 72 Fed. Supp. 801, which was formerly pending in the Dis-

trict Court of the United States for the Western District of Louisiana before the same Judge before whom the case at bar was tried, our motion to dismiss the complaint on jurisdictional grounds was disposed of by the trial Judge in the following language:

> "Obviously, there is jurisdiction as to the subject matter: Diversity of citizenship (the defendant is a resident of Illinois and the plaintiff is a resident of Louisiana), and there is the necessary amount. *Jud. Code,* Sec. 24 (1), 28 U. S. C. A. Sec. 41 (1). Now, as to venue, the case of *Neirbo Co. et al.* v. *Bethlehem Shipbuilding Corporation, Ltd.,* 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, applies. When the defendant qualified to do business and did business in the State of Louisiana, it made itself subject to suit in its line of business, anywhere in Louisiana, in both the state and Federal courts in Louisiana. It waived its right to plead to the venue; it is estopped from making the present motion. This really should end this opinion; for it is enough!";

and, that decision was specifically made applicable to the case at bar by the following concluding paragraph:

> "This opinion is fully applicable to the case of *Soileau et al.* v. *New Amsterdam Casualty Co,* Opelousas Division, Western District of Louisiana, tried by us with jury, and now on appeal, wherein the same character of motion to dismiss was overruled and denied. We pray the Circuit Court of Appeals for the Fifth Circuit to use this opinion in the consideration of the Soileau case, wherein the point at issue here is to be first decided. No formal opinion was written by us in the *Soileau* case."

Now, with all due respect to the trial Judge, it is our contention that the conclusions reached by him, as quoted above, do not dispose of either of the grounds which we

have herein urged in support of our argument against his power to take jurisdiction of this case.

We have already pointed out in previous divisions of this brief, and believe that we have successfully demonstrated, that the diversity of citizenship which admittedly exists between respondent and petitioner is not the diversity of citizenship necessary to sustain the Federal court's jurisdiction.

And as to the argument now being made against the jurisdiction of the Federal court, while we have no quarrel with the holding in the case of *Neirbo Company, et al.* v. *Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, we sincerely submit that the question of venue, as therein discussed, has no relationship whatsoever to the jurisdictional question which we are now raising. The venue with which this Court was concerned in deciding the *Neirbo* case was the venue provided for by Section 51 of the Judicial Code, and the *Neirbo* case simply held that the qualifying by a foreign corporation to do business in a state other than that of its corporate domicile, and the registration and designation of an agent upon whom service might be made in such state, amounts to a waiver of the requirements of Section 51 of the Judicial Code as to venue, or to a consent to be sued in a Federal court sitting within such state; and accordingly, that the venue provisions of a state statute may be invoked to sustain the venue of the action in the Federal courts.

Notwithstanding the very respectable dissenting opinion in the *Neirbo* case, written by Mr. Justice Roberts and concurred in by the Chief Justice and Mr. Justice McReynolds, we have no quarrel with the conclusion reached in the majority opinion, but we do not see wherein the reasoning in that case is applicable to the case at bar. It is not necessary

for us to question, nor do we in the present argument, the amenability in general of this petitioner to the jurisdiction of the Federal courts sitting in Louisiana. *What we do question is the right of this respondent to enter the Federal court to assert a procedural right granted by a state statute which, within itself, lays the venue of her action "in the parish where the accident or injury occurred, or in the parish where the assured has his domicile."* The District Court of the United States for the Western District of Louisiana is certainly not a court of the parish where the accident occurred (Evangeline Parish), nor of the parish where the assured has his domicile (likewise Evangeline Parish). In fact, it is not a court of any parish of the State, and does not even hold sessions of court in Evangeline Parish. It is our contention that while the venue provisions of this statute might not prevent the Federal court from taking jurisdiction of the litigation (if that jurisdiction otherwise exists within the framework discussed in earlier divisions of this brief) on an application for removal by a defendant, nevertheless these provisions do exclusively determine the courts to which a complainant may initially apply for an enforcement of the procedural and remedial rights granted him by this statute.

Point VII

Irrespective of our primary grounds of objection to the jurisdiction, and even if both should be rejected, there is in this case an absence of jurisdictional averments as to diversity of citizenship, even as between respondent and petitioner.

In considering the question of jurisdiction, and in determining whether or not the jurisdiction of a Federal court over a diversity case has been affirmatively established, it is but natural that the jurisdictional allegations as

to diversity of citizenship between the actual parties litigant should receive first attention; and consequently the first inquiry to which we should have addressed ourselves at the time this suit was filed was that of ascertaining that respondent's pleadings affirmatively establish the necessary diversity of citizenship between herself and her minor ward on the one hand, and petitioner on the other. For, as pointed out in the case of *Mansfield C. & L. M. R. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. Ed. 462, cited *supra:*

> ". . . according to the uniform decisions of this court, the jurisdiction of the Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record."

In the case at bar, the sole allegations as to the citizenship of the parties are found in Article II of respondent's complaint (R. p. 2) wherein it was alleged that respondent and her minor son were "both residents of the Parish of Evangeline, Louisiana," and that petitioner was "a corporation domiciled in another state." These allegations were admitted by petitioner in the first paragraph of its answer (R. p. 22) but nowhere in the record are they otherwise amplified.

At the outset, we must acknowledge (not without embarrassment) that our initial consideration of these allegations of respondent's complaint was had from the viewpoint of state court pleading and practice, and, as a consequence, we overlooked the fundamental distinction between *residence* and *citizenship,* insofar as the establishment of Federal Court jurisdiction is concerned. As a consequence of this oversight, we omitted directing the attention either of the District Judge or of the Court of Appeals to the deficiency, for jurisdictional purposes, which is thus apparent on the face of the pleadings in this case, and are now urg-

ing this deficiency for the first time to this Court in support of the present application.

This Court has repeatedly held that the terms "resident" and "citizen" are not synonymous within the contemplation of the judiciary acts for jurisdictional purposes in the Federal court. For instance, in the case of *The Southern Pacific Company* v. *Denton,* 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942, it was stated:

> "It has long been settled that an allegation that a party is a 'resident' does not show that he is a 'citizen,' within the meaning of the judiciary acts; and to hold otherwise in this case would be to construe the petition as alleging that the defendant was a citizen of the same State with the plaintiff, and thus utterly defeat the jurisdiction."

Again in the case of *Travis* v. *Yale & Towne Manufacturing Company,* 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460, this Court said (at page 469 of the Law Edition Reporter):

> "Of course the terms 'resident' and 'citizen' are not synonymous, and in some cases the distinction is important (*La Tourette* v. *McMaster,* 248 U. S. 465, 470, 63 L. Ed. 362, 365, 39 Sup. Ct. Rep. 160)."

And a decision on all fours with the present case was recently handed down by the Circuit Court of Appeals for the Ninth Circuit, being *Jeffcott, et al* v. *Donovan* (C. C. A. 9—1943), 135 Fed. (2d) 213. The entire opinion in that case is quite brief and it covers the circumstances here existing so completely that we beg leave of Court to quote it practically in full, as follows:

> "It is alleged in the amended complaint, upon which together with defendants' answer the action went to trial and judgment, that the plaintiff is a resident of the State of New Jersey and that the defendants are residents of the 'State and District of Arizona, and

that the matter in controversy exceeds the sum of $3,000.00 exclusive of interest and costs.' These allegations are admitted by the answer. No other allegation regarding the subject of jurisdiction is contained in the pleadings.

"Diversity of citizenship as a basis for the jurisdiction of a cause in the District Court of the United States is not dependent upon the residence of any of the parties, but upon their citizenship. 28 U. S. C. A., Sec. 41, Subdivision (1), Judicial Code, Sec. 24, amended. *Bouvier* (Baldwin's Students Ed. 1934) says, 'Citizen and resident (q. v.) are not synonymous, and in some cases the distinction is important.' It might well be that a resident of any one state in point of fact may be a citizen of that or any other state. Cf. *La Tourette* v. *McMaster*, 248 U. S. 465, 470, 39 S. Ct. 160, 63 L. Ed. 362; *The Slaughter-House Cases*, 83 U. S. 36, 73, 16 Wall. 36, 73, 21 L. Ed. 394; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 78, 40 S. Ct. 228, 64 L. Ed. 460. See an able discussion in *Baker* v. *Keck*, D. C., 13 F. Supp. 486; also 14 C. J. S., Citizens, Sec. 1, p. 1130.

"At the time set for the argument in this cause the defect in the pleadings thus apparent was discussed in open court, but no amendment thereto was proffered. The cause was argued upon the merits subject to the court's determination as to the trial court's jurisdiction and thereafter was submitted. No jurisdiction of the District Court was alleged or shown.

"Reversed and remanded."

Under the authority of the cases cited above, it seems clear that, on the point of diversity of citizenship, (even as between respondent and petitioner) respondent has failed to establish the jurisdiction of the Court in which her action was originally filed, for the reason that her allegations as to *residence* are not sufficient to establish affirmatively that respondent and her minor son were *citi-*

zens of Louisiana or were not *citizens* of the unnamed state in which petitioner was alleged to be domiciled.

Accordingly, it would seem to be indisputable that respondent has failed affirmatively to establish the initial prerequisite to necessary jurisdiction, based on diversity of citizenship, even as between respondent and petitioner, and, if for no other reason, petitioner would seem to be entitled to the writ which is now being applied for, in order that if our primary contentions should be rejected, this basic and fundamental error may be corrected.

Such a procedure was, in fact, followed by this Court in the case of *Great Southern Fire Proof Hotel Company* v. *Jones,* 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842, wherein, *after a writ of certiorari had been granted by this Court,* the suit was dismissed for lack of jurisdiction. In that case, this Court, speaking through Mr. Justice Harlan, said:

> "The bill rests the jurisdiction of the circuit court upon the ground of the diverse citizenship of the parties. But was the case as presented by the record one of which the circuit court of the United States could take cognizance by reason of diversity of citizenship? When this question was suggested at the argument counsel responded that no objection had been urged to the jurisdiction of that court. But the failure of parties to urge objections of that character cannot relieve this court from the duty of ascertaining from the record whether the circuit court could properly take jurisdiction of this suit."

And after ascertaining that the allegations of the pleadings were not sufficient to establish the necessary diversity of citizenship, it concluded:

> "Without considering the merits of the case, we are constrained to reverse the judgments of the circuit court of appeals and of the circuit court, and remand

the cause for further proceedings consistent with this opinion.

"Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill upon the subject of the citizenship of the parties. If the amendment shows a case within the jurisdiction of the circuit court, the parties should be permitted to proceed to a final hearing; otherwise, the bill should be dismissed at the plaintiffs' costs without prejudice to another suit in a court of competent jurisdiction."

We again acknowledge that, until engaged in the actual prepartion of this application, we had overlooked this fundamental deficiency in respondent's jurisdictional allegations, and we take this means of expressing our regret that the situation as it exists was not by us called to the attention of either of the Courts below. Justification will perhaps be extended us by reason of the fact that, under our view of the jurisdictional issues primarily involved, the diversity of citizenship between respondent and petitioner is not determinative of the Court's jurisdiction in this case; and that the sincere convictions which we entertain in that respect resulted in our attention being drawn away from the point now being made. The point, as a matter of fact, remains unimportant unless your Honors should reject our objections to the jurisdiction as heretofore urged.

However, it is our conception of the law, that, as stated by Mr. Justice Matthews in the *Mansfield* case, *supra*, "the Court is bound to ask and answer for itself" this question of jurisdiction, "even when not otherwise suggested and without respect to the relation of the parties to it." And, as a consequence, should the other jurisdictional issues be resolved against us, this oversight on our part, which we now readily acknowledge, cannot operate as a waiver of the jurisdiction; and cannot, we submit in all

humility, serve to relieve the Circuit Court of Appeals of its obligation to determine this jurisdictional question for itself, nor to relieve this Court of its responsibility to exercise its supervisory power for the correction of this obvious error. And should a writ be allowed for this purpose we submit further that, in the interests of justice, the entire jurisdictional issue should be opened up for decision by this Court.

Point VIII

Irrespective of the question of jurisdiction, the procedural statute now under discussion is not applicable to civil actions in the Federal courts.

We cannot conclude our discussions of the jurisdictional questions present in this case without urging one further point of error in the opinion of the Circuit Court of Appeals. For regardless of our other jurisdictional objections, we firmly believe that the Court erred in holding that this statute *as a procedural statute* could be enforced by a Federal court.

The Rules of Civil Procedure were promulgated by the Supreme Court of the United States pursuant to the authority conferred by the *Act of June 19, 1934, c. 651 48 Stat. 1064, 28 U. S. C. A. 723 b.* Pursuant to *Rule 86,* they became effective September 16, 1938. Thereafter, they became and are now the sole criterion of procedure in the Federal courts. This has been made clear by this Court in the case of *Sibbach* v. *Wilson & Company,* 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, in which it was held:

> "Whatever may be said as to the effect of the Conformity Act while it remained in force, the rules, if they are within the authority granted by Congress, repeal that statute, and the District Court was not

bound to follow the Illinois practice respecting an order for physical examination."

Since, as we have already demonstrated, Act 55 of 1930 is strictly a procedural statute, it was at the time of its adoption applicable in civil actions at law in the Federal courts, because of the provisions of the Conformity Act (28 U. S. C. A. Sec. 724), but since the Rules of Civil Procedure have had the effect of repealing that statute, this Act as a procedural statute is not enforceable by the Federal courts.

For *Rule 1* of the Rules of Civil Procedure provides that "these Rules govern the procedure in the District Courts of the United States in all suits of a civil nature," subject to certain exceptions stated in *Rule 81* which are not applicable here; and under this sweeping provision these Rules of Civil Procedure can be considered in no other light than as *exclusive* and as *prohibiting* the use by the Federal courts of any remedial procedures provided for by state statutes but not included in these Federal Rules.

We have already pointed out in a preceding division of this brief that this statute as a procedural or remedial statute is analogous to the various Declaratory Judgment Acts which have been adopted by some of the states, and we have cited your Honors to at least one case (*Nashville C. & St. L. R. R. Co.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730) wherein prior to the adoption of the Federal Declaratory Judgment Act, your Honors sustained jurisdiction over a controversy which had been submitted to a Federal District Court under the procedural provisions of a State Declaratory Judgments Law. In that case, of course, the procedural remedy provided by the state statute was enforced in the Federal court, since your Honors held that the substantive issues presented for decision constituted a

"controversy" within the purview of the Constitutional limitations upon the authority of United States courts. And that case might be argued as authority against the proposition which we are now asserting, were it not for the fact that it arose prior to the effective date of the Federal Rules of Civil Procedure and while the Conformity Act was still in effect, and the enforcement in that case of the procedural remedy provided by the state statute was justified under the Conformity Act. However, that case if presented today would, we submit, be subject to the same objection which we are now making, since the Federal Rules of Civil Procedure have now had the effect of taking away from the Federal courts the right to enforce the procedural remedies provided by a state Declaratory Judgments Act. A proceeding to obtain a declaratory judgment in the Federal courts would now have to be brought within the purview of the Federal Declaratory Judgments Law, and not under the provisions of a state law regulating such procedure.

The Circuit Court of Appeals undertook to answer this argument with the following statement:

> "Nor is the Act procedural in the sense that the Federal Rules of Civil Procedure are procedural; it deals neither with practice nor procedure in civil actions."

As in the case of other conclusions to which we have already directed criticism, the Court cited no authority in support of this statement, and we submit, none can be found. A procedural statute obviously relates to procedure and Act 55 of 1930 is nonetheless procedural merely because it does not deal with rules of evidence, conduct of the trial, etc.

As a procedural statute which provides for procedures not included within the Federal Rules of Civil Procedure, this becomes unenforceable in the Federal courts and we

submit in all earnestness that the Circuit Court of Appeals erred in not so deciding.

Point IX

In this case the Circuit Court of Appeals for the Fifth Circuit has rendered a decision which is squarely in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same subject matter.

One of the reasons which we assigned for the allowance of this writ was the alleged conflict between the conclusions reached in this case and the conclusions previously reached by the Circuit Court of Appeals for the Eighth Circuit. In assigning this reason, we had in mind the case of *Thompson et al.* v. *Mooré* (CCA 8, 1940), 109 Fed. (2d) 372, to which a brief reference has been made in an earlier division of this brief, and it is our opinion that a brief consideration of that case will serve to demonstrate the conflict to which we now refer, and which, we sincerely submit, should be resolved by this Court.

We have already demonstrated that under the applicable Louisiana jurisprudence the Court's holding in this case to the effect that Act 55 of 1930 confers a substantive right upon the injured party cannot be sustained, and that on the contrary this act, as construed by the Louisiana courts, is strictly procedural or remedial in character. That being true, the *Thompson* case, which was a suit under the Declaratory Judgment Act (also a procedural statute), becomes squarely in conflict with the case at bar.

In the cited case, the appellee, Mrs. Moore, had been injured in a collision between an automobile, in which she was riding, and a train then being operated by appellant, Thompson, Trustee, and his employees. The accident occurred in March, 1936, and in December of that year Mrs. Moore filed suit in the state court for damages for the in-

juries which she had received. The defendants answered that suit in the state court, denying negligence on their part and alleging contributory negligence on the part of Mrs. Moore. In March, 1938, Mrs. Moore amended her complaint in the state court by alleging that the accident was the result of the concurring negligence of one Lawrence, the engineer in charge of the train, and made him a party defendant. Lawrence was a citizen of the State of Arkansas, of which complainant was also a citizen. The appellants then removed that case to the Federal court on the ground of a separable controversy, alleging that Lawrence was not the engineer in charge of the train at the time of the collision and that his joinder as a party defendant was fraudulently made for the purpose of defeating Federal court jurisdiction, there being a diversity of citizenship between appellants and Mrs. Moore. When the cause was lodged in the Federal court on this petition for removal, Mrs. Moore filed a motion to remand, and on the hearing of that motion, it appeared conclusively that Lawrence was not the engineer in charge of the train, and that the engineer actually in charge was one Avery, also a resident of Arkansas. Thereupon, counsel for Mrs. Moore "announced in open Court that a non-suit would be entered in the cause pending and that they would immediately file another suit in the Circuit Court of St. Francis County, Arkansas, against complainants (appellants) herein to recover damages for the alleged injuries suffered by her." Pursuant to this announcement, a non-suit was entered in the case then pending, and five days later Mrs. Moore filed her suit in the state court against appellants and Avery, jointly, for the damages which she claimed as a result of the collision. This second suit in the state court was tried in March, 1939, resulting in a judgment for $3,000.00 against appellants and Avery, jointly, and an appeal from that judgment was pending in the state court of Arkansas at the time the cited case was

heard in the Circuit Court of Appeals for the Eighth Circuit.

On the day following the entering of a non-suit in Mrs. Moore's first case, and four days before the filing of her second suit in the state court, appellants filed the cited case in the District Court of the United States for the Eastern District of Arkansas. The suit was filed against Mrs. Moore under the Federal Declaratory Judgment Statute and had for its purpose the seeking of a declaratory judgment decreeing that no liability existed on the part of appellants in favor of appellee. In defense of this suit in the Federal court, Mrs. Moore filed a plea in abatement in which she alleged the previous proceedings as above described, and denied jurisdiction of the Federal court. The issue presented for decision in that case was outlined by the Court in the following language:

> "This is a suit for a declaratory judgment brought in the district court by the appellants against the appellee. Upon motion and plea in abatement the petition was dismissed for want of jurisdiction. The only question presented on the appeal is whether or not the district court had jurisdiction of the subject matter.
>
> "In her motion to dismiss and plea in abatement the appellee admitted the collision and injury, the residence of the parties, and the amount involved, but denied jurisdiction of the Federal Court *on the ground that the 'actual controversy' existing at and prior to the commencement of the suit was between her as plaintiff on one side and the appellants and the engineer in charge of the operation of the train at the time of the collision jointly on the other*, and not between herself and appellants alone." (Emphasis ours.)

In deciding this issue, the Court of Appeals for the Eighth Circuit held:

> *"The jurisdiction of the district court depends, as pointed out above, upon the nature of the controversy existing between the parties at and prior to the commencement of this suit on October 4, 1938.* In *Aetna*

Life Ins. Co. v. *Haworth, supra,* 300 U. S. at page 244, 57 S. Ct. at page 465, 81 L. Ed. 617, 108 A. L. R. 1000, the Supreme Court said that 'It is the nature of the controversy • • • that is determinative' of its jurisdiction. Here the facts alleged show that Mrs. Moore since March, 1938, was claiming that the appellants and the engineer in charge of the train at the time of the collision were joint tort-feasors and that her injuries resulted from their concurrent negligence in failing to ring the bell or sound the whistle of the locomotive for the crossing where the collision occurred in violation of section 11135 of Pope's Arkansas Digest. She never abandoned that claim. When at the hearing on the motion to remand on October 3, 1938, she discovered that she was mistaken in the name of the engineer; that it was Avery and not Lawrence; her counsel 'announced in open court' that she would 'immediately file another suit' in the state court. *Her controversy from that moment, if not before, was with the appellants and the engineer jointly. No other controversy between appellants and appellee is disclosed by the pleadings.*" (Emphasis ours.)

"• • •

"*Since the controversy by Mrs. Moore, a citizen of Arkansas, was against Avery, also a citizen of Arkansas, and appellants, citizens of Missouri, jointly, the district court was without jurisdiction, and the court did not err in dismissing the complaint.*" (Emphasis ours.)

The language used in this decision is peculiarly applicable it seems to us, to the case at bar. Here, as there, the character of the controversy presented depends upon the situation of the parties at the time of the commencement of the action as disclosed by the allegations of the complaint, and those allegations clearly show that under the substantive law of this State respondent's actual controversy exists only against Louis O. Campbell.

It is legally impossible for this respondent to allege a controversy solely with this petitioner, because the procedural statute which gives her the right to pursue petitioner provides her with no substantive cause of action, and the substantive law upon which her controversy must depend only provides her with a cause of action against, or controversy with, the assured, Louis O. Campbell.

In this case, as well as in the cited one, it is the nature of the actual controversy, and the citizenship of the real parties to that controversy, which are determinative of jurisdiction. *Such actual controversy, under the substantive law of Louisiana, is not between this respondent and this petitioner,* and, notwithstanding any diversity of citizenship which might exist between these parties, the Federal Court cannot take jurisdiction unless diversity of citizenship also exists between respondent and Louis O. Campbell, the other party to the actual controversy.

It seems to us, and we respectfully so submit, that when Act 55 of 1930 is viewed (as it has been construed by the Louisiana courts) as a strictly procedural or remedial statute, the present case is on all fours with the cited case, and that an irreconcilable conflict thereby becomes apparent between the decision of the Circuit Court of Appeals for the Fifth Circuit in the case at bar and that of the Circuit Court of Appeals for the Eighth Circuit in the cited case, and that the writ now being applied for should be allowed in order that such conflict may be resolved by this Court.

Point X

Act 301 of 1908 (La.) as amended by Act 210 of 1944 (La.) has been construed in such a way as to impair the obligations of petitioner's contracts of insurance as issued to its assured.

In view of the position which we have taken in regard to the Court's lack of jurisdiction in this case and the sincerity of our conviction that the case must be dismissed for lack of jurisdiction, it is perhaps anti-climactic for us to engage in a discussion of the errors which we conceive to have been committed by the District Court and perpetuated by the Circuit Court of Appeals on the merits of this litigation.

At least one of these errors, however, is of sufficient general interest and importance to justify special comment, if only in passing. We refer here to the Court's holding that the exclusion contained in petitioner's policies which withdrew the protection of such policies from its assured's employees did not have the effect of relieving petitioner of any liability to respondent for damages for the bodily injuries sustained by her minor son.

In the summary statement appearing in our application herein, we admitted quite frankly that the employment of young Soileau by petitioner's assured was in violation of *Act 301 of 1908*, as amended by *Act 210 of 1944*, and we likewise now admit in all candor that such employment was illegal under the terms of that Act.

But it was, and is, our contention that, although illegally employed, young Soileau was nevertheless in point of fact an *employee* of petitioner's assured. He had been employed to perform certain duties and in that capacity he was engaged in the performance of those duties at the time of his injuries. And it is inconceivable to us how it can be held

that the illegality of his employment had the effect of constituting him *not* an employee within the meaning of the exclusions which were written into petitioner's policies.

Granting for the sake of argument (a point which we do not for one moment admit) that there was "a direct causal connection between the prohibited hiring and the injuries sustained, and there may be said to be negligence as a matter of law on the part of the employer", that very statement negatives the conclusion previously reached that "it may not be said that he was an employee of Campbell". If young Soileau was not an employee within the meaning of these exclusions, then it cannot consistently be held that the hiring of this young man constituted actionable negligence on Campbell's part; and on the other hand, if the hiring constituted negligence on Campbell's part, then it cannot be consistently said that he was not an employee within the intendment of these exclusions.

We recognize that the inconsistency to which we now refer would probably not constitute a sufficient basis for the granting by this Court of a writ of certiorari and a review by this Court of the conclusions reached by the Circuit Court of Appeals; but we do believe that in order to reach its conclusions and in an effort to resolve the inconsistency inherent therein, the Circuit Court of Appeals has placed a construction upon *Act 301 of 1908*, as amended by *Act 210 of 1944*, which cannot be constitutionally defended, and that such fact merits the consideration of this Court in passing upon our present application.

It is deemed unnecessary to encumber this brief with a copy of that statute, as a sufficient reference thereto for our present purposes will be found on page 6 of the Circuit Court's opinion (R. p. 292).

As to this statute the Court held (R. p. 292):

> "A fifteen-year-old boy is without capacity in general to enter into any express contract, and *Act No. 301 of*

1908, as amended by Act No. 210 of 1944, prevents the raising of a contract of employment by implication of law.'' (Emphasis ours.)

Understand, we do not now contend that this Act, in prohibiting the employment of minors in certain lines of work, is in any way unconstitutional. *What we do contend is that if that statute be construed as meaning that the prohibition which it admittedly establishes against the employment of minors has the effect of preventing the establishment of an employee-employer relationship between the minor and his employer, so as to remove the minor thus illegally employed from the category of an ''employee'' within the meaning of the exclusions contained in petitioner's policies, such a construction of the statute impairs the obligation of petitioner's contracts, and if permitted to stand, will have the effect of making the statute violative of Article I, Section 10 of the Constitution of the United States.*

The prohibition against the employment of a minor which this statute sets forth cannot, we submit, be constitutionally construed as detracting from the effectiveness of the very plain exclusion clauses set out in petitioner's policies, whereby the parties to those contracts agreed that they should not apply to ''any employee of the insured while engaged in the business of the insured.''

As a consequence, the conclusion is irresistible that even though Campbell, himself, might have been liable to respondent for the damages sustained by her minor son had he been made a party to this suit, there is no constitutional ground upon which it can be held that such liability on Campbell's part is protected by petitioner under the terms of these policies, or that an injured party would be entitled to a judgment against petitioner in the face of these exclusions.

We shall not attempt to document our contentions in this respect with references to the applicable jurisprudence,

other than to point to the general rule of statutory construction that a statute should always be given a construction which will harmonize with constitutional restrictions, unless such a construction is clearly excluded. Our only purpose in bringing out the thoughts expressed in this division of our brief is to indicate the probability of error on the part of the Circuit Court in interpreting this statute, in order that due regard thereto may be had by this Court in considering the propriety of allowing the writ for which we are now applying.

Conclusion

We sincerely trust that the foregoing brief has not been extended to such a point as too severely to tax the time and patience of the Court. If so, we trust that your Honors will let the earnestness of our convictions upon the points which we have discussed afford us justification for the trespass of which we are thus guilty.

We fully realize that brevity on the part of petitioning counsel should be resorted to at all times in an effort to reduce the Court's labor in considering any application for the exercise of its supervisory jurisdiction. On the other hand, we feel that every point which we have discussed is one which logically belongs in any presentation of this case as a whole, and that no point which we have discussed could have been omitted without sacrifice to the cause with which we are concerned. We have tried to refrain from discussing any of the errors which we conceive to have been committed by the Circuit Court of Appeals in its decision of the case on its merits, and have undertaken to restrict this brief to a discussion of those points of error which in our view can fairly be said to fall within the framework of Rule 38 of the Rules of this Court.

In view of the novelty of our primary grounds of objection to the jurisdiction of the District Court in this case;

in view of the fact that the Federal Courts in Louisiana have assumed jurisdiction of cases of this kind in many instances without the questions now being raised ever having been presented or passed upon; in view of the importance of this case and of the questions here presented to litigants in Louisiana having occasion to invoke the procedure authorized by Act 55 of 1930; in view of the importance which liability insurance has come to occupy in the lives and wellbeing of men and women in every walk of life; in view of the social character of the legislation now under discussion and the tendency which it illustrates to make liability insurance more readily available to the payment of claims against the assured; in view of the general interest and importance which thereby attaches to the question of Federal court jurisdiction, not only from the standpoint of liability insurers but from the standpoint of all litigants in cases where liability insurance is involved; and last, but not least, in view of the probability (approaching, as we think, the point of certainty) of error on the part of the Circuit Court of Appeals in reaching the conclusions which it has reached in this case; we submit in all sincerity that special and important reasons are therefore present in this case which justify the allowance of the writ now being applied for.

As a consequence, we respectfully submit that the writ of certiorari, as heretofore and herein applied for, should be granted and the entire case ordered up for review by this Court; and that in due course the judgment and decree of the Circuit Court of Appeals should be set aside and a judgment entered dismissing this suit for lack of jurisdiction, or, in the alternative, reversing the decision of the

Circuit Court of Appeals and dismissing respondent's suit against your petitioner at her costs.

Respectfully submitted,

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